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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 9 (Pet. App. A, 1–62).[1] The opinions of the Federal Communications Commission are reported at 56 FCC 2d 94, and 59 FCC 2d 892 (Pet. App. B, 63–92 and C, 93–96).

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1977 (Pet. App. D, 97–98). A timely petition for rehearing was denied on May 10, 1977 (Pet. App. E, 99, 100).

[1] The appendices are separately presented in a companion volume and cited as "Pet. App."

An extension of time within which to file a petition for a writ of certiorari to and including October 7, 1977 was granted by the Chief Justice on August 5, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1), and 28 U.S.C. § 2350(a).

QUESTIONS PRESENTED

1. Whether the broadcast medium's unique qualities and the requirement that broadcasters program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory action, to the prohibition of indecency in 18 U.S.C. § 1464 at times when there is a strong probability that unsupervised children are in the audience.

2. Whether the FCC correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464.

STATUTES INVOLVED

Section 1464 of Title 18 of the United States Code, 62 Stat. 769, 18 U.S.C. § 1464 provides:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Sections 312(a)(6), 312(b)(2), and 503(b)(1)(E) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E), are reproduced at Pet. App. F, 101–102).

STATEMENT

This case grows out of a continuing effort of the Federal Communications Commission to clarify the standard used to decide whether and under what circumstances broadcast language is "indecent" within the meaning of 18 U.S.C. § 1464. Although criminal prosecution under this section is solely within the jurisdiction of the Department of Justice, Congress has also given the Commission certain enforcement obligations

with respect to Section 1464. Thus, the Commission, upon finding a violation of Section 1464, is specifically empowered to revoke a station's license, 47 U.S.C. § 312(a)(6), or to issue a cease and desist order, 47 U.S.C. § 312(b)(2), or to impose a monetary forfeiture, 47 U.S.C. § 503(b)(1)(E). (See Pet. App. F, 101–102).

In a declaratory order which followed a citizen's complaint, the Commission attempted to give specific meaning to the Congressional prohibition against broadcasting "indecent" language. (Pet. App. B, 63–92). At the heart of the Commission's concern was exposure of children to language describing sexual or excretory activities and organs in words that are considered patently offensive as measured by contemporary community standards for the broadcast medium. (Pet. App. B, 70–71).

1. The Commission's declaratory order responded to a complaint from a father in New York City concerning language broadcast by a local radio station. The complainant stated that he and his young son had heard a broadcast during the early afternoon hours which contained such words as "cocksucker," "fuck," "cunt," and "shit." He labeled the material "garbage" and expressed concern that it had been aired at a time when children, including his son, heard it. (Pet. App. B, 64–65).

An inquiry to the station licensee, the Pacifica Foundation, established that it had broadcast a pre-recorded comedy monologue of approximately 12 minutes duration. This monologue was found by the Commission to be

> almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . ." Thereafter, there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience. (Pet. App. B, 65).

A verbatim transcript of the recording is reproduced in the Appendix. (Pet. App. B, 58–62; 74–79).

In responding to the complaint, the station asserted that the recorded selection was broadcast at the conclusion of an

analysis of the use of language in contemporary society and that it constituted "an incisive satirical view of the subject under discussion." The station did not respond to the complainant's concern that this language was broadcast at a time when young children would undoubtedly have heard it. Nor did the station explain how the broadcast of the language under these circumstances was consistent with its earlier pledge to the FCC that it would remain "sensitive to its responsibilities to its listening audience and carefully schedule for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (Pet. App. B, 65–67, n.1, n.5).

2. In carrying out its mandate to promote the larger and more effective use of radio in the public interest, 47 U.S.C. § 303(g), and in enforcing 18 U.S.C. § 1464 through regulatory actions, the Commission has identified separate and distinct standards to determine whether material broadcast is obscene or indecent. In 1970, the Commissioner focused upon "indecency" in *Eastern Educational Radio (WUHY–FM)*, 24 FCC 2d 408 (1970). It found that the words "fuck" and "shit" were used gratuitously and repeatedly throughout the broadcast and that "(t)his (language) fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people." 24 FCC 2d at 415. In the Commission's judgment such words in themselves did not appeal to the prurient interest of listeners and, therefore, were not obscene under the *Roth-Memoirs* test.[2] Accordingly, the Commission relied on the indecency prohibition in Section 1464. A crucial consideration was the probable presence of children in a radio audience:

> No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. 24 FCC 2d at 411.

The Commission acknowledged that it was acting in a particularly sensitive constitutional area and stated that it would

[2] *Roth* v. *United States*, 354 U.S. 407 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

welcome judicial review. The station did not seek judicial review.

Sonderling Broadcasting Corp., 27 Pike & Fischer Radio Reg. 2d 285, *recon. denied*, 41 FCC 2d 777 (1973), involved the broadcast of a program containing explicit descriptions of oral sexual acts. In finding this material "obscene" and "indecent," the Commission again pointed to the unique pervasive qualities of radio, and the fact that children were in the broadcast audience. *Sonderling* was affirmed in *Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397 (D.C. Cir. 1975). While the Court based its opinion solely upon the obscenity finding and did not reach the alternative finding that the material was indecent, it clearly recognized the relevance of the presence of children in the audience. 515 F. 2d 397, 404.

3. In the declaratory order under review (Pet. App. B, 63–92), the Commission acknowledged the statutory prohibition against censorship or interference with the right of free speech by means of radio communication. 47 U.S.C. § 326. However, it noted that Section 326 of the Communications Act was qualified by the prohibition against the broadcast of indecent language, which originally had been a part of Section 326 (Pet. App. B, 67), and later was transferred to 18 U.S.C. § 1464. The FCC said that broadcasting's uniquely intrusive qualities warranted a different First Amendment analysis from that applicable to books, newspapers, and ordinary speech. Among the distinguishing characteristics identified by the Commission are: children have easy access to radios and in many cases are unsupervised by parents in their use of the radio; radio receivers are in the home, a place where an individual's privacy interest is entitled to particular deference; the government must license and regulate the use of spectrum space in the public interest. (Pet. App. B, 68–69). In addition, the Commission found that its action was justified by its statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. § 303(g). The Commission feared the widespread use of indecent language on the public's airwaves resulting in the impairment of broadcasting as an effective mode of communication for all and the exposure of nonconsenting recipients, especially children, to indecent language. (Pet. App. B, 73).

The Commission's analysis is perhaps best summarized in the following passage from its opinion:

> . . . it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder*, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.*

*Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and carefully schedules for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience."

(Pet. App. B, 70–71).

When the danger of exposure to children in the audience is reduced to a minimum, the Commission suggested that "a different standard might conceivably be used." The definition of indecent would remain the same; but the Commission would consider whether the matter broadcast, despite the use of offensive language, had serious literary, artistic, political or scientific value when considered as a whole. (Pet. App. B, 71). The Commission narrowed its holding to the particular complaint before it, concluding that the language was patently offensive by contemporary community standards for the broadcast medium.[3]

[3] The Commission concluded: ". . . words such as 'fuck', 'shit', 'piss', 'motherfucker', 'cocksucker', 'cunt' and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464." (Pet. App. B, 72).

On reconsideration the Commission again emphasized that it did not intend to place an absolute ban on the broadcast of offensive language, "but rather sought to channel it to times of day when children most likely would not be exposed to it." (Pet. App. C, 94).

4. Pacifica sought review of the Commission's order, invoking the jurisdiction of the D.C. Circuit Court of Appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. A sharply divided panel of the court reversed the Commission's decision "(w)ithout deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected. . . ." (Pet. App. A, 2). The majority opinion recognized that the indecency provision of 18 U.S.C. § 1464 has never been "authoritatively construed" by the courts (Pet. App. A, 11–12) and left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium.[4] The majority only agreed that the Commission's order was overbroad and vague in violation of the no-censoring provision of 47 U.S.C. § 326. (Pet. App. A, 18, 19–20). The dissent agreed with the Commission's indecency finding on the specific facts of this case. (Pet. App. A, 43–57).

The Commission suggested rehearing en banc, asking the full court to decide the important issue of whether indecent in Section 1464 has a different meaning from obscene, and the specific question whether the Commission had correctly found the language as broadcast indecent. Four of the nine circuit judges voted for rehearing. (Pet. App. E, 99).

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the questions presented by this case require a reconciliation of conflicting con-

[4] A concurring judge in the majority did conclude that indecent did not have a separate meaning from obscene, taking the position that only hard core pornography falling within this Court's test in *Miller* v. *California*, 413 U.S. 15 (1973), was prohibited from the airwaves by Section 1464. (Pet App. A, 19–42).

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stitutional interests as pointed out by Judge Leventhal in his dissent below. (Pet. App. A, 43–57). Correct resolution of these questions is of paramount importance to the Federal Communications Commission, but more important to broadcasters and to the public. While the court below was sharply divided, its opinion—together with a later opinion by another Federal Court [5]—would establish that only hard core pornography falling within the definition of *Miller* v. *California*, 413 U.S. 15 (1973), may be barred from broadcasting over the nation's airwaves by Section 1464. The FCC respectfully submits that this proposition is not compelled either by the Communications Act of 1934 or by this Court's past decisions. Moreover, such a proposition should not be finally established for the entire nation's broadcast medium until this Court has had a full opportunity to consider the conflicting interests identified by the FCC and Judge Leventhal in their opinions.

1. At its last term this Court once again recognized that free speech questions which arise in "the electronic broadcast medium . . . warrant special consideration." *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691, 2709 (1977). The FCC is obliged by the Communications Act to enforce by administrative action the obscenity and indecency prohibition of 18 U.S.C. § 1464. It must also insure that broadcasters program in the public interest. Congress, which in 1934 prohibited the FCC from engaging in "censorship" of broadcasting, also prohibited in the same section of the Communications Act the utterance of "obscene" or "indecent" language by means of radio communication. Congress enacted the following provision:

[5] In *United States* v. *Lewis Leonard Simpson*, — F. 2d — (No. 77-1108, 7th Cir., July 29, 1977), a federal court for the first time held that the obscene and the indecent in § 1464 are to be read as a single proscription. Slip op. 12. In reaching that conclusion the court assumed that this court would interpret the "indecent in § 1464 as it has in [18 U.S.C.] § 1462." (Slip op. 11). In a footnote the court wrote, "At some point the balance between the speaker and listener must tip in favor of the listener, but where that point is we need not decide, in view of our interpretation of the statute." Slip op. at p. 11, n. 8.

CENSORSHIP; INDECENT LANGUAGE

> SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.* 48 Stat. 1064, 1091 (Emphasis added).

This prohibition against the broadcast of obscene or indecent language was later transferred to the criminal code, 18 U.S.C. § 1464. However, the Commission is specifically authorized to revoke broadcast licenses, issue cease and desist orders, and impose monetary forfeitures for violation of Section 1464. See 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E). The order under review was part of the FCC's continuing effort to furnish specific and narrow meaning to the Congressional prohibition against the broadcast of indecent language. At the heart of the agency's decision in this case was the recognition that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 213–214, citing among other cases *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970).[6] Thus, a parent like the complainant in this case may seek assistance from the Commission if a broadcaster which has been entrusted with a scarce public resource abuses that trust by broadcasting for nearly twelve minutes a record which repeats over and over words which depict sexual or excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium, at a time when children are in the audience.

[6] To a lesser extent the Commission also attempted to afford some protection to those unconsenting adults "who do not want the type of language broadcast in this case thrust into the sanctuary of their homes. *Cf. Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970)." (Pet. App. B, 72).

As Judge Leventhal observed, the government has the authority under the Constitution

> to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified . . . as society's concern with the quality of its community life. (Pet. App. A, 56)

The President's Commission on Obscenity and Pornography recognized that broadcasting is entitled to special consideration "should the need arise" because of "the possible thrusting of sexually explicit materials upon unwilling persons." [7]

That need has arisen in the 1970's as more and more complaints from the general public and Congress have compelled the FCC to act. See, *e.g.*, *WUHY-FM*, *supra*, 24 FCC 2d 408; *Sonderling Broadcasting Corp.*, *supra*, 41 FCC 2d at 778 & n. 6; *The Trustees of the University of Pennsylvania*, FCC 75-1333, December 4, 1975.[8] The FCC has attempted to adapt this

[7] *The Report of the Commission on Obscenity and Pornography* (Bantam Ed. (1970)), p. 73, n.11, made the following observation:

"The broadcasting or telecasting of explicit sexual material has not constituted a serious problem in the past. There is, however, a potential in this area for thrusting sexually explicit materials upon unwilling persons. Existing federal statutes imposing criminal and civil penalties upon any broadcast of 'obscene' material do not adequately address this problem because they do not describe with sufficient specificity what material would be prohibited, or under what conditions. Hence, the repeal of these statutes is recommended, upon the understanding that the Federal Communications Commission either already has, or can acquire through legislation, adequate power to promulgate and enforce specific rules in this area should the need arise."

[8] The logical extension of the abstract proposition that only hard core pornography can be barred from the nation's airwaves is dramatized by the transcript of some broadcasts on the University of Pennsylvania's educational station. Much of the material, while apparently indecent, could not be considered hard core pornography. On December 4, 1975, the Commission issued a notice of apparent violation of 18 U.S.C. § 1464. The Commission employed the indecency standard enunciated in the declaratory order challenged in this case. A copy of the notice to the University of Pennsylvania is included as an Addendum to this petition.

Court's decisions in other areas to the unique characteristics of the broadcasting medium. It has consistently encouraged judicial review of its actions in this sensitive area. The agency has always recognized that this Court would ultimately have to balance the conflicting interests. The FCC respectfully submits that the matter is now ripe for Supreme Court review.

2. In its declaratory order, the Commission indicated that "broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is scarcity of spectrum space, the use of which the government must therefore license in the public interest." (Pet. App. B, 69).

Congress, in enacting the Radio Act of 1927, 44 Stat. 1172, and its successor, the Communications Act of 1934, 48 Stat. 1064, recognized that the federal government would have a vital role in regulating the use of the limited radio spectrum. The inherent limitation imposes special obligations on broadcasters, and warrants closer government scrutiny of radio than would be appropriate for other media.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court stated that radio communication posed unique problems not present in other free speech areas. The Court's conclusion rested upon its finding that broadcasting, unlike other publication, consumed scarce spectrum space,[9] a feature which

[9] It is sophistry to suggest as some have that radio frequencies are no longer scarce. In this regard, the Commission was recently notified that sale of an FM station in New York City, comparable to Pacifica's station, was contemplated for $2,500,000, a figure substantially in excess of the market value of its physical plant and good will. The difference is attributable to the value of its frequency.

would justify differences in the First Amendment standards applicable to broadcasters. Speaking for this Court, Mr. Justice White stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. 395 U.S. at 388.

In 1973, the Court reaffirmed this position in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973). There the Court said that because the broadcast media utilized a limited public resource, there was present "an unusual order of First Amendment values." More explicitly, in *United Church of Christ* v. *FCC,* 359 F. 2d 994, 1003 (D.C. Cir. 1966), the D.C. Circuit stated:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owner; a broadcast station cannot. . . . [A] broadcast license is a public trust subject to termination for breach of duty.

The station licensee involved in this case, Pacifica, ignored its special obligations, claiming a right to be judged by the standard which might apply to a privately operated "adult" entertainment establishment and not the higher standard applicable to public trustees. *Cf. Lorain Journal* v. *FCC,* 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *Yale Broadcasting* v. *FCC,* 478 F. 2d 594 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 914 (1973).

Radio communication is also unique because it is directed indiscriminately toward the public. In a different way from other media of mass communication, it is both pervasive and intrusive. The passive act of listening to the radio is different, practically, socially and physically, from obtaining literature or gaining admission to a movie theatre. To gain access to risque literature or motion pictures, a consumer must enter a store or theatre and consciously choose to make a purchase.

Book store and movie theatre proprietors can exclude persons who are under age and thus reduce the likelihood that young children will be exposed to matters that are deemed unacceptable for their consumption. Furthermore, parents find it simple and natural to regulate the use of magazines, books and movies. Parents can and do segregate from the family library books considered unsuitable for children. Parents can and do monitor the movies their children must pay to see. But radio broadcasts are much more difficult for parents to supervise. Broadcasts are easily accessible to young persons even in the privacy of the home, without the need for comparable affirmative acts.

Thus, unlike a book store owner or theatre operator, a broadcast licensee cannot rely upon parental scrutiny as an effective means of sorting out and excluding youthful customers. Moreover, as is widely known in our society, television viewing and radio listening for young children are largely devoid of direct parental supervision. Although most parents attempt to monitor their children's viewing and listening habits—particularly during evening hours when parents themselves place heavy reliance on broadcast media to satisfy their entertainment needs—it is unrealistic to expect such close oversight all the time. During times when unsupervised children are probably in the audience, a broadcaster is obliged by 18 U.S.C. § 1464 and the public interest standard to recognize this fact and to program accordingly. A broadcaster should not force parents to accept the risk that children will be exposed to broadcasts of patently offensive words depicting sexual and excretory activities or organs.

The regulation of books and motion pictures on the one hand, and broadcast material on the other, can be distinguished on grounds other than that more affirmative acts are required to gain exposure to the former media. In order to *avoid* exposure to sexually offensive broadcast material, affirmative acts are required. This is a particularly important consideration when large numbers of unsupervised children are likely to be in the audience. Young children have neither the capacity to consent

nor the judgment to avoid what large numbers of parents believe would be inappropriate for them to see or hear.[10]

This Court has long recognized a special societal concern for protecting young children from sexually explicit materials. *Miller* v. *California*, 413 U.S. at 19; *Ginsberg* v. *New York*, 390 U.S. at 637–43. The concern is warranted not only by the State's interest, *parens patriae*, in the moral and emotional adjustment of children, but also as a recognition of the right of parents to rear their children according to their own best judgment. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 213–4.

The Commission shaped its order to protect this interest, but at the same time to hold to a minimum the order's penumbral impact. The special interest in protecting children is reinforced in the radio context by the fact that a broadcast intrudes into the privacy of the home. This Court has consistently held that individual privacy is entitled to greater protection in the home than on the streets. See, *e.g.*, *Rowan* v. *Post Office*, *supra*. Accordingly, the Commission indicated that broadcasters must show "[a] decent respect for the right of those who want to be 'free from unwanted expression in the confines of one's home.'" (Pet. App. B, 72).

Pacifica placed primary reliance upon *Erznozik* v. *City of Jacksonville*, 422 U.S. 205 (1975), for the proposition that the Commission's order is constitutionally infirm. But even assuming *Erznozik* is applicable to the broadest medium, it clearly stated that selective restrictions on speech were permissible when

> The speaker intrudes upon the privacy of the home [citation omitted] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. 422 U.S. at 209.

Radio communication presents not one but both of these special circumstances. Accordingly, the Commission's judg-

[10] "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975), quoting *Ginsberg* v. *New York*, *supra*.

ment that the intrusive qualities of the medium require the channeling to appropriate time periods of patently offensive language depicting sexual and excretory activities and organs in the *narrow and precisely circumscribed context* where young, unsupervised children are likely to hear it in the privacy of the home was entirely reasonable.

3. In reversing the Commission's order, a panel of the D.C. Circuit could not agree. Chief Judge Bazelon concluded that "indecent" did not have a separate meaning from "obscene." Judge Tamm, the other member of the majority, recognized that up to that time the indecency provision of 18 U.S.C. § 1464 had never been "authoritatively construed" (Pet. App. A, 12), and left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium. The majority could only agree that the Commission's order was overbroad and vague, in violation of the no-censorship provision of the Communications Act, 47 U.S.C. § 326. Despite the fact that the Commission's holding was based upon a specific complaint and limited to the facts complained about, the court of appeals read the order broadly as if it applied to facts, circumstances and arguments that were not before the Commission. However, as Judge Leventhal pointed out in dissent, the following particular considerations were critical to the Commission's holding:

> —the words were broadcast "in the early afternoon . . .
> —when children were undoubtedly in the audience."
> —the words were "pre-recorded"
> —the words were "repeated over and over"
> —the words were "deliberately broadcast."

(Pet. App. A, 72). Accordingly, the Commission held that the language "*as broadcast* was indecent." (Emphasis added). This finding necessarily included the limitation of time and manner of presentation. (Judge Leventhal Dissenting, Pet. App. A, 54–56).

The Commission agrees with Judge Leventhal that the declaratory order should have been read narrowly. That order addressed a specific set of facts. When the Commission and the Courts are confronted with a different set of facts, they can then determine whether the principles announced in this order

should be applied, modified or extended.[11] There is "no constitutional impediment either to an agency determination in the first instance, or to its use of an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (Judge Leventhal Dissenting, Pet. App. B, 53). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367; *Yale Broadcasting* v. *FCC*, 478 F. 2d 594.

CONCLUSION

In its declaratory ruling and in petitioning for certiorari, the Commission is seeking to give discrete meaning to the word "indecent," which appears in a statute of Congress. The statute applies only to the broadcast medium, which is different for a variety of reasons from other modes of expression and therefore warrants different treatment. Advocates of the widest freedom of expression acknowledge the existence of other competing interests, including the interest in protecting children from exposure to certain offensive material. The FCC's narrow declaratory order in this case continued its attempt to reconcile these competing interests in the broadcast context. We respectfully request this Court to review the opinion of the court of appeals, which simply did not come to grips with concerns that have troubled the Commission, Congress, broadcasters and the public for a considerable period of time.

Respectfully submitted,

LAWRENCE W. SECREST III,
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DANIEL M. ARMSTRONG III,
Associate General Counsel,
JOSEPH A. MARINO,
JOHN E. INGLE,
Counsel,
Federal Communcations Commission,
Washington, D.C. 20554.

[11] This process had already begun with the Commission's partial reconsideration of the declaratory order. See 59 FCC 2d 892 (Pet. App. C, 93–96).

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC-75-1333
37716

December 4, 1975

IN REPLY REFER TO:

8320-H

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

The Trustees of the University of Pennsylvania
Radio Station WXPN(FM)
110 College Hall
University of Pennsylvania
Philadelphia, Pennsylvania 19104

Gentlemen:

This letter constitutes a Notice of Apparent Liability for forfeiture issued under Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 503(b)(2), pursuant to Section 503(b)(1)(E) of the Act, 47 U.S.C. 503(b)(1)(E).

THE FACTS. Radio Station WXPN(FM), Philadelphia, Pennsylvania, licensed to the Trustees of the University of Pennsylvania, originated in the fall of 1974 a "live" program called The Vegetable Report which was broadcast weekly from its studios. The Vegetable Report, described by the station's FM Program Director as a "free-form music, call-in and chatter" type of program, was broadcast on Monday evenings between the hours of 4:00 p.m. and 7:00 p.m., but on occasion ran until 7:30 p.m. or later. The program was moderated by three University of Pennsylvania students who were members of the WXPN(FM) staff and who were joined occasionally by a Temple University student. On January 20, 1975, the following excerpts were broadcast during The Vegetable Report between approximately 6:15 p.m. to 7:15 p.m.:

Male announcer:	-- on the air.
Female caller:	Kiss my pussy, you dog you -
Male announcer:	You're beautiful! You're a poet!
Female caller:	Suck my pussy, you motherfu--
Male announcer:	You're a poet! Don't hang up - keep going.
Female caller:	Suck out my ass. Get a straw and strip it to the bone and suck out that motherfucker.
Male announcer:	Wow!

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The Trustees

Female caller: . . .thirteen year old son, you white fucker. Robbing and raping and they don't even know how to fuck. They're taking after your motherfucking --

Male announcer: I apologize for the dead air, but that's one way of dealing with poet on the 'phone. . .(Pause). . .You're magnificent! . . .I never - I really -- No, seriously, your command of the language is fantas--. . . Say something?

Second male announcer: I can't really hear her anymore now.

Male announcer: Hello. Hi. . .Hi. . .Well. . .(Pause). . . That was a little kid who said that.

Second male announcer: She still talking?

Male announcer: Yeah, can you hear her?

Second male announcer: No, I can't hear her.

Male announcer: Can you hear her now?

Second male announcer: No, I could only hear what was on key.

Female caller: You incorinated (phonetic) mammy -- you bastard you --

Male announcer: The way they're cussing, I don't know if I ought to put them on the air.

Second male announcer: Naw, you'd better not, really.

Male announcer: Suck a bloody Kotex?. . .Well, she hung—. . . Suck a bloody Kotex. . .That's really some — You repeated yourself.

Male announcer: WXPN, You're in-- You're on the air.

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The Trustees

Male caller: If you bought your clothes from Kraft Brothers, you got fucked up the ass sideways. . . . (Laughter). . .

Female caller: Yeah, it's really boring. It's a boring game.

Male announcer: Oh yeah, beating-off is much more fun.

Female caller: Oh, definitely.

Male announcer: What's the difference between a talking dog and a person?

Second male announcer: I don't believe I said there was a difference.

Male announcer: I just wanted to know.

Second male announcer: I don't see much, except that dogs usually squat to piss. . . .(Laughter). . .

Male caller: I want you to know that Cornplant and I saw the wave of the future this afternoon.

Male announcer: Yeah.

Male caller: We stopped into one of the porno stores on Market Street and we saw there the "Greek Goddess" -- Not just two holes, but three -- $29.95 rubber doll --

Male announcer: You mean in the mouth, in the butt, and between the legs?

Male caller: That -- As the man in the store described it -- "Not only has she got a mouth and a cunt, but she's got an asshole too." . . . (Laughter). . .

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The Trustees

Male announcer: WXPN, You're on the air.

Male caller: Hi, this is Chris and I go to William Penn and I need a fuck.

Male announcer: Yeah -- Well, tough luck to you, fellow.

On January 27, 1975, the following excerpts were broadcast on WXPN(FM) in the period from approximately 6:45 p.m. to 7:30 p.m. during The Vegetable Report:

Male announcer: And also -- and also. . .a man once told Jay that he wanted to suck the titties Jay's got.

Female caller: Oh--

Male announcer: He said to him, "I want to suck them titties you've got." And Jay's got some titties! I wouldn't mind sucking them my own bad self.

Male announcer: WXPN. You're on the air.

Male caller: Yeah. Listen to this story. This guy goes into a store. He asks me-- I say-- he says, "I would like a head of lettuce." The lady says to him, she says, "We don't have any head of lettuce". The guy says, "I don't understand." So, the lady backs up and she says, "What do you get when you take the 't' out of tomato?" And the guy backs up and says, "Omato!" The guy says, "What do you get when you take the 'p' out of potato?" The guy backs up--

Male announcer: Says, "Otato"--

Male caller: "Otato!" Then the guy-- Then the lady finally says--

Announcer and caller simultaneously: "What happens when you take the 'fuck' out of tomatoes?"

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The Trustees

Male announcer: And she-- he says-- we-- That's right-- "There ain't no 'fuck' in tomatoes!" He says, "That's right, there ain't no 'fuckin' tomatoes!" Good-bye.

Male announcer: It makes your husband horny to hear you say "fuck"?

Female caller: . . .(Laughter). . .It does. . . .(Laughter)

Male announcer: There's a lot of guys-- How old is your husband?

Female caller: There's-- How old is he?

Male announcer: Yeah.

Female caller: Oh, thirty. . .three.

Male announcer: You know, there's a lot of guys who really get hot-- Does your husband like you to talk dirty in bed when you're fucking?

Female caller: He tells me he doesn't, but I don't believe him. . . .(Laughter). . .

Male announcer: He's lying through his teeth - he loves it!

Female caller: How's my son?. . .(Laughter). . .Oh, thank you, I'm glad you finally answered. I mean one time I was-- I had the 'phone ringing for twenty minutes-- and then-- uh-- then I had to go down to see my son-- uh-- 'cause I won't put the radio on downstairs because I don't want--

Male announcer: 'Cause you don't want him to hear what we say?. . .(Laughter). . .We'd be such an education for your kid. It'd be so healthy for him to hear the things that we're saying--

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The Trustees

Female caller:	I was--
Male announcer:	Because if your kid listens now he won't ever be satisfied with the shitty radio that they put out.
Female caller:	He wants to talk to you.
Male announcer:	Well, put him on.
Female caller:	Okay, say "hi", Johnny. Say "hi".
Male announcer:	Hello.
Child:	Hi. Who are you?
Male announcer:	I'm David. Who are you?
Child:	I. . . .
Female caller:	He said, "Who are you?" He said, "Who are you?"
Child:	Johnny.
Male announcer:	Johnny. How old are you, Johnny?
Child:	Three.
Male announcer:	Johnny, can you say "fuck"?
Female caller:	Oh-- you son of a gun, you! . . .(Laughter) . . .You should have seen the look on his face!
Male announcer:	Look, let me tell you something --
Female caller:	Oh!
Male announcer:	If you son listens to this show-- If your son listens to this show-- where there's good radio-- where people say words that other people are afraid to say-- when he listens to other AM and FM he won't be satisfied. We're building the vanguard of the 1980 revolution right now. When your kid is twenty--

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The Trustees

Second male announcer:	David, she wants-- She's trying to say something.
Male announcer:	What? I'm sorry.
Female caller:	That's something else I wanted to say. All these people that-- you know, they're against your show and they-- they want to change it and all this kind of stuff-- You know it's very simple to change your dial if they don't like it.
Male announcer:	Exactly. They can all screw-off.
Female caller:	They can just -- Well, yeah, they can do that, too. But, I mean like-- uh-- like this is an accident. ...(Laughter)...
Male announcer:	Hey, listen, do you-- do you--
Female caller:	—too, on the radio. Really, it was.
Male announcer:	Do you want to tell us--
Female caller:	--able to shut the radio off.
Male announcer:	Do you want to tell us your name? I think you should call us every week. What's your name?
Female caller:	No, I can't.
Male announcer:	Well, do you want to make up-- you want to make up a name?
Female caller:	Uh-- Uh-- Sarah Bernhardt. How's that?
Male announcer:	I like "Orange peel" better.

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Female caller: "Orange peel". That's kind of cute. I like that.

Male announcer: All right.

Female caller: "Orange peel". But, I don't know if I will-- Oh, gosh. . .

Male announcer: Listen, you should call us more often and you should let your son listen to it, and you should teach your son that for him to beat-off at his age is good-- for him to say "fuck" is good-- for him to want to go to bed with you is healthy-- for him to want to screw you, a la cetera, is healthy--

Female caller: You know, he-- he does want to go to bed with me.

Male announcer: Oh, you should give him all the physical attention you can give him now, so he won't be starved for it and go out raping later.

Female caller: Oh, he gets plenty of physical attention. I mean he-- he--

Male announcer: When was the last time you blew him?

Female caller: What?

Male announcer: When was the last time you blew him?

Female caller: Blew who?

Male announcer: Your son.

Female caller: Oh, get ass!. . .(Laughter). . .You must be. . .(inaudible).

Male announcer: You can't draw lines like that-- If--

Female caller: Yes, I can. . . .(Laughter). . .He said a bad thing, Johnny. I'm not going to tell you.

Male announcer: Yeah. . . .(Laughter). . .Just show him. Just show him, don't tell him. Just, you know, show him. You don't need to tell him once you start showing him.

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Female caller: I think-- Well, he's asking questions already.

The foregoing are representative and illustrative of the type of material presented in these two broadcasts. On January 28, 1975, the Director of Student Activities, University of Pennsylvania, notified the WXPN(FM) Station Manager and FM Program Director by telephone and letter that much of the material broadcast during the January 27 program of The Vegetable Report violated any reasonable standard of public broadcasting; that the incident along with others made it evident that the WXPN staff was incapable of managing the station in a responsible manner; that on behalf of the University, he was mandating that the show in question be immediately and permanently taken off the air; and that he was placing the station on notice that the airing of such material in the future would result in an immediate suspension of broadcast operations. On March 5, 1975, the President of the University of Pennsylvania issued a statement which indicated that acting under the authority invested in him by the Trustees he was temporarily vesting authority for the management and operation of the station in the Director of Student Activities and suspending the present constitution of the station; that the authority of the Director of Student Activities, until approval of a new constitution for WXPN, included the right to issue standards for broadcast material, appoint and remove all station officers and exclude any student from participation in station activities, including broadcasting; and that he would appoint an ad hoc committee composed of faculty, administrators, and students to work with the Director of Student Activities and the Student Activities Council to recommend to the President and Trustees a new constitution. Subsequent correspondence with the Commission from University administrators and the Trustees indicated that further corrective action had been taken with regard to the operation of the station that included a temporary set of programming guidelines; limitations on the use of non-University personnel; inquiries into the availability and cost of tape monitoring services; the suspension of the three University of Pennsylvania students involved in The Vegetable Report from the station staff and broadcasting for the remainder of the school year; the permanent barring of the Temple University student involved in The Vegetable Report from the station; the appointment of the President's ad hoc committee referred to in his statement of March 5, 1975; the establishment of a Trustees' Subcommittee for Electronic Communications Media; the establishment of a Board of Overseers for WXPN to formulate guidelines on programming, engineering, staffing, financing, and future development of the station; and appointment of a Faculty Advisor for WXPN(FM) to be a ready resource to the officers and staff of the station. Mr. Donald T. Regan, Chairman, Trustees of the University of Pennsylvania, stated on behalf of the Trustees in a letter dated October 8, 1975, in response to

The Trustees

a Commission inquiry that the Trustees do not consider the programming reflected by the transcript of excerpts from The Vegetable Report to be consistent with the programming policy of any responsible station, particularly a station operating in a University community, and that they are confident that the broadcasts were an aberration, resulting from the thoughtlessness and brash actions of a few unrepresentative persons.

DISCUSSION. Despite corrective action which the licensee states was taken after these broadcasts occurred, the licensee is apparently liable for violation of Section 1464 of Title 18 of the United States Code 1/ for broadcasting obscene and indecent matter. Section 503(b)(1)(E) of the Communications Act authorizes the imposition of a forfeiture against broadcast licensees who violate Section 1464. The Commission's position with respect to the broadcast of obscene or indecent matter has previously been clearly set forth. See Sonderling Broadcasting Corp., 27 RR 2d 285, recon. denied 41 FCC 2d 777 (1973), affirmed sub nom. Illinois Citizens Committee for Broadcasting, et al. v. FCC, 515 F.2d 397 (D. C. Cir. 1975), petition for rehearing denied March 13, 1975; Eastern Educational Radio (WUHY-FM), 24 FCC 2d 408 (1970); and In re Citizen's Complaint against Pacifica Foundation Station WBAI(FM), FCC 75-200, adopted February 12, 1975, 32 RR 2d 1331. At least the following four particular segments of the January 27, 1975, broadcast of The Vegetable Report appear to be obscene under the threefold test set forth by the U. S. Supreme Court in Miller v. California, 413 U. S. 15 (1973):

(1) Male announcer: You know, there's a lot of guys who really get hot--Does your husband like you to talk dirty in bed when you're fucking?

(2) Male announcer: Johnny, can you say "fuck"?

(3) Male announcer: Listen, you should call us more often and you should let your son listen to it, and you should teach your son that for him to beat-off at his age is good--for him to say "fuck" is good--for him to want to go to bed with you is healthy--for him to want to screw you, a la cetera, is healthy--

(4) Male announcer: When was the last time you blew him?

Female caller: Blew who?

Male announcer: Your son.

1/ Section 1464 reads: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The Trustees

The Commission believes that these particular segments appear to appeal to the prurient interest, describe sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value. We note that the Court in Illinois Citizens Committee, supra, at page 406, indicated that it would not be inappropriate for the Commission to evaluate a broadcasting program that is episodic in nature with a cluster of individual and typically disconnected commentaries such as a call-in program of this type. We believe that these segments of the January 27 broadcast appear to present a pandering approach to explicit descriptions of ultimate sexual acts. Furthermore, the broadcast not only occurred at a time of the day when children might be expected to be present in the listening audience 2/, but at one point apparently involved a three-year-old child directly in the discussion.

These two broadcasts of The Vegetable Report also appear to have been indecent under the then prevailing standard regarding indecent language set forth in the WUHY case, supra, and the subsequent standard enunciated in WBAI, supra, to comply with the Miller decision, supra. The Commission believes that the unique, intrusive nature of broadcasting whereby it comes directly into the privacy of the home, frequently without any advance warning of its content, coupled with the use of patently offensive language on the airwaves at a time when children can reasonably be expected to be in the listening audience requires administrative sanction. It appears that the use of such words as "motherfucker", "fuck", "piss", and "titties" during the two programs of The Vegetable Report described above are "indecent" in that they depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and were broadcast at a time when children may reasonably be expected to be in the audience (i.e., in the early evening). 3/

In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(E) of the Communications Act of 1934, as amended, the Trustees of the University of Pennsylvania have incurred an apparent liability of two thousand dollars ($2,000).

The Trustees of the University of Pennsylvania are hereby notified that they have the opportunity to file with the Commission, within thirty (30) days of the date of receipt of this Notice, a statement in writing as to why they

2/ In re Citizen's Complaint against Pacifica Foundation WBAI(FM), supra, noted in paragraph 2 that Illinois Citizens Committee was the first judicial decision upholding the Commission's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.

3/ It appears that such words also violate the "indecent" standard set forth in WUHY, supra, in that they are utterly without redeeming social value when used in the context broadcast.

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The Trustees

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should not be held liable, or if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which the Trustees of the University of Pennsylvania may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve the Trustees of the University of Pennsylvania of liability, or to justify either reduction or remission of the amount of liability.

The Commission notes that in a Supplement to Opinion of November 20, 1974, the Court in Illinois Citizens Committee, supra, at page 406, stated, "Whatever the difficulty of determining the relevant community standards in a national context, we believe that the Commission must adopt, in its deliberations leading to any substantive determination of obscenity, approaches that provide, as nearly as possible, the functional equivalent of a jury determination of a clear community consensus that the material is lewd and offensive. In approaching this sensitive obligation, the Commission does not have the free hand of bureaucratic censorship." Accordingly, if the Trustees of the University of Pennsylvania file such a statement in writing as described above within the thirty (30) day period denying liability or do not file any such statement within that time period with respect to non-liability or facts and reasons why the forfeiture should be of a lesser amount, the Commission shall, prior to the issuance of any substantive determination such as an Order of Forfeiture, establish an appropriate proceeding to provide the functional equivalent of a jury determination with respect to determining the relevant community standards for the purpose of ascertaining whether the above excerpts broadcast during The Vegetable Report contain obscene and/or indecent matter violative of Section 1464 of Title 18 of the United States Code.

In accordance with our established procedure, we also state that if the Trustees of the University of Pennsylvania do not wish to file a statement which denies liability and, in addition, do not wish to avail themselves of the opportunity of a further administrative proceeding and further substantive determination in the matter, they may within thirty (30) days of the date of the receipt of this Notice, make payment of the forfeiture by mailing to the Commission a check, or similar instrument, in the amount of two thousand dollars ($2,000) drawn payable to the Treasurer of the United States.

BY DIRECTION OF THE COMMISSION

Vincent J. Mullins
Secretary

U.S. GOVERNMENT PRINTING OFFICE : 1977 O - 247-884

Supreme Court, U. S.
FILED
OCT 7 1977
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No. 77-528

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

PETITIONER'S APPENDIX

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOSEPH A. MARINO,
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Federal Communications Commission
Washington, D.C. 20554.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1391

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communications Commission

---

Argued March 30, 1976

Decided March 16, 1977

Harry M. Plotkin, with whom *Thomas Schattenfield*, *David F. Tillotson* and *Mary Candace Fowler*, were on the brief for petitioner.

Joseph A. Marino, Counsel, Federal Communications Commission with whom *Ashton R. Hardy*, General Counsel, *Raymond L. Strassburger* and *Richard J. Bodorff*, Counsel, Federal Communications Commission and *Robert J. Wiggers*, Attorney, Department of Justice, were on the brief for respondent. *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, also entered an appearance for respondents.

Henry Geller and *Charles M. Firestone*, filed a brief on behalf of the Committee for Open Media, San Francisco Chapter as *amicus curiae*.

Before: BAZELON, *Chief Judge*, TAMM and LEVENTHAL, *Circuit Judges*.

Opinion filed by *Circuit Judge* TAMM.

Concurring opinion filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* LEVENTHAL.

TAMM, *Circuit Judge*: This appeal by Pacifica Foundation (Pacifica) challenges a Federal Communications Commission (FCC or Commission) ruling which purports to ban prospectively the broadcast, whenever children are in the audience, of language which depicts sexual or excretory activities and organs, specifically seven patently offensive words.

Without deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected, we find that the challenged ruling is overbroad and carries the FCC beyond protection of the public interest into the forbidden realm of censorship. For the reasons which follow, we reverse the Commission's order.

I. FACTUAL BACKGROUND

On the afternoon of October 30, 1973, Station WBAI, New York, New York (which is licensed to Pacifica), was conducting a general discussion of contemporary society's attitude toward language as part of its regular programming. The WBAI host played a segment from the album, "George Carlin, Occupation: Foole," Little David Records. Immediately prior to the broadcast of the Carlin monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some. Those who might be offended were advised to change the station and return to WBAI in fifteen minutes. The monologue consisted of a comedy routine that was almost entirely devoted to the use of seven four-letter words depicting sexual or excretory organs and activities.

On December 3, 1973, the Commission received a complaint from a man in New York stating that, while driving in his car with his young son, he had heard the WBAI broadcast of the Carlin monologue. This was the only complaint lodged with either the FCC or WBAI concerning the Carlin broadcast.

The Commission determined that clarification of its definition of the term "indecent" was in order. As a result, in *Pacifica Foundation*, 56 F.C.C.2d 94 (1975) (hereinafter *Order*), the Commission defined as indecent, language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. The Commission found that the seven four-letter words contained in the Carlin monologue depicted sexual or excretory organs and activities in a patently offensive manner, judged by contemporary community standards for the broadcast medium, and accordingly, were indecent. The Commission prohibited them from being broadcast under the authority granted it by 18 U.S.C. § 1464 (1970).[1] As a further rationale for its decision, the Commission cited its statutory obligation to promote the larger and more effective use of radio in the public interest.[2]

The underlying rationale of the *Order* can be traced to the Commission's view of broadcasting vis-à-vis other modes of communication and expression. According to

---

[1] 18 U.S.C. § 1464 (1970) provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[2] 47 U.S.C. § 303 (1970) provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, necessity or interest requires, shall:
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . .

the Commission, the broadcasting medium carries with it certain unique characteristics which distinguish it from other modes of communication and expression. In the Commission's view the most important characteristic of the broadcast medium is its intrusive nature. Unlike other modes of expression, the television or radio broadcast comes directly into the home without any significant affirmative activity on the part of the listener. *See Eastern Educational Radio (WUHY-FM)*, 24 F.C.C. 2d 408 (1970); *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975). In the *Order* the FCC concluded this intrusive nature was a critical factor due to four important considerations: (1) children have access to radios and in some cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. *Order* at 97.

In light of these considerations the Commission felt that questions concerning the broadcast of patently offensive language should be dealt with in a public nuisance context. As a result the Commission determined that the principle of channeling [3] should be borrowed from nuisance law and applied to the broadcasting medium. Rather than prohibit the broadcast of indecent language altogether, the Commission sought to channel it to times of the day when it would offend the fewest number of listeners.

In hopes of avoiding the charge that the *Order* was overbroad, the Commission declared that the channeling

[3] The law of nuisance does not say, for example, that no one shall maintain a cement plant; it simply says that no one shall maintain a cement plant in an inappropriate place, such as a residential neighborhood.

was specifically intended to protect children from exposure to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcasting medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. *Order* at 98.

Finally, the Commission did note that when the number of children in the audience is reduced to a minimum, a different standard might conceivably be used. In such an analysis the definition of indecent would remain the same, however, the Commission would also consider whether the material had serious literary, artistic, political or scientific value. *Order* at 100.

In concurring statements, Commissioners Reid and Quello felt the *Order* did not go far enough. Commissioner Reid believed indecent language was inappropriate for broadcast at any time. Commissioner Quello was in agreement, commenting that "garbage is garbage" and it should all be prohibited from the airwaves. *Id.* at 102, 103.

Appellant Pacifica argues that section 1464 is unconstitutionally vague unless the term indecent is subsumed by the term obscene as defined in *Miller* v. *California*, 413 U.S. 15 (1973). Pacifica contends that the Supreme Court, in *Hamling* v. *United States*, 418 U.S. 87 (1974) and *United States* v. *12 200 Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973), has made it clear that the term indecent, as used in federal criminal statutes, must be construed as referring to material involving the specific types of explicit conduct defined in *Miller* v. *California*,[4] *supra*, in order for the constitu-

[4] The *Miller* standard is

> a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

tionality of the statute employing the term to be sustained. Pacifica also cites numerous other federal and state court decisions which have invariably held that the term indecent, as used in criminal statutes, refers to material which appeals to prurient interest as distinguished from material which is merely coarse, rude, vulgar, profane or opprobrious.[5]

Pacifica argues that the Carlin monologue is not obscene because it does not appeal to any prurient interest and because it has literary and political value. Therefore, Pacifica argues it is entitled to constitutional protection in light of *Miller* and *Hamling, supra.* Pacifica concludes that such constitutional protection means that these words may not be prohibited by section 1464. In addition, Pacifica contends that the non-obscene language used in the Carlin monologue does not come within the fighting words prohibition set forth in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

Finally, Pacifica contends that the FCC standard of indecency, as expressed in the *Order*, is overbroad as it does not assure that programs of serious literary, artistic, political or scientific value will be allowed to air.[6] The amicus brief in this appeal argues that the *Order* is too far-reaching and will have an especially harsh effect on the broadcast of literature depicting minority cultures. In addition, the amicus brief quotes studies,[7] which show that large numbers of children are in the

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b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;

c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

[5] Pacifica's Brief at 24, n.23.

[6] *See* App. B. at 28 et seq.

[7] Amicus's Brief at 17 *quoting* Statement of John A. Schneider, Before the House Subcommittee on Communications, July 15, 1975, p. 9.

broadcast audience until 1:30 a.m., as further evidence that the *Order* is overbroad.

One week prior to oral argument in this case the FCC released a memorandum and order seeking to clarify its earlier *Order*. The order of clarification[8] was in response to a petition filed by the Radio Television News Directors Association. In the clarification order, the Commission declared that it never intended to place an absolute prohibition on the broadcast of indecent language but only sought to channel it to times of the day when children would least likely be exposed to it.[9] The clarifying order, in attempting to narrow the scope of the original *Order*, ruled that indecent language could be broadcast in a news or public affairs program or otherwise if it was aired at a time when the number of children in the audience was reduced to a minimum, if sufficient warning were given to unconsenting adults, and if the language in context had serious literary, artistic, political or scientific value.[10] The Commission determined that it would be inequitable to hold a licensee responsible for indecent language broadcast during live coverage of a newsmaking event.[11] The Commission thought it better to trust the licensee to exercise judgment, responsibility and sensitivity to the needs, interest, and tastes of the community.[12]

II. Resolution

Despite the Commission's professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects

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[8] Pacifica Foundation, —— F.C.C.2d ——, 36 P&F Radio Reg.2d 1008 (1976).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

by means of radio and television communications. In promulgating the *Order* the Commission has ignored both the statute which forbids it to censor radio communications [13] and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.[14]

The Commission claims that its *Order* does not censor indecent language but rather channels it to certain times of the day. In fact the *Order* is censorship, regardless of what the Commission chooses to call it. The intent of the Commission is clear. It is to keep language that describes sexual or excretory organs and activities from the airwaves when there is a reasonable risk that children may be in the audience. The Commission expressly states that this language has "no place on radio" and that when children are in the audience a claim that it has literary, artistic, political or scientific value will not reedem it. *Order* at 98.

As the study cited by the amicus curiae, *supra* note 7, illustrates, large numbers of children are in the broadcast audience until 1:30 a.m. The number of children watching television does not fall below one million until 1:00 a.m. As long as such large numbers of children are in the audience the seven words noted in the *Order* may not be broadcast. Whether the broadcast containing such words may have serious artistic, literary, political or scientific value has no bearing on the prohibitive effect

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[13] 47 U.S.C. § 326 (1970) provides:

> Nothing in this Act [The Communications Act of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.

[14] *See* Sonderling Broadcasting Corp., 41 F.C.C.2d 777 (1973); Jack Straw Memorial Foundation, 29 F.C.C.2d 334 (1971); Columbia Broadcasting System, Inc., —— F.C.C.2d ——, 21 P&F Radio Reg.2d 497 (1971); Oliver R. Grace, 22 F.C.C.2d 667 (1970).

of the *Order*. The Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*.[15]

Section 326 of the Communications Act specifically prohibits the FCC from interfering with licensee discretion in programming. *Writers Guild of America, West, Inc.* v. *FCC*, No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976). Such interference is exactly what the *Order* calls for. Therefore it is an action which takes the Commission beyond the limits of the powers which Congress has delegated to it. Congress specifically withheld from the Commission any power to censor broadcasts. *Anti-Defamation League of B'Nai B'Rith* v. *FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969); 47 U.S.C. § 326 (1970). Any examination of thought or expression in order to prevent publication of objectionable material is censorship. 403 F.2d 169.

In an effort to sustain the validity of its *Order* the Commission labels its prospective ban a channeling mechanism. The label is unimportant, the effect of the *Order* is critical. The effect is that of censorship and that is beyond the mandate of the FCC.

In past decisions the Commission has recognized the ban against censorship and has taken another tack against indecent language. In *Jack Straw Memorial Foundation*, 29 F.C.C.2d 334 (1971), the Commission determined that the decision whether to broadcast obscene or indecent language was a licensee decision. In this case, the licensee, after careful consideration, broadcast the record, "Murder at Kent State", which contained language which the licensee considered obscene and ordinarily would not have permitted to be broadcast. The trustees and managerial employees decided that in

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[15] App. B. at 28-29.

their judgment the use of the particular language was necessary under the circumstances. In its ruling the Commission held that

> [t]his is a matter of judgment which we conclude the Commission has left to the licensee. In this case, language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid accurate account of a disasterous incident in our recent history. We conclude that on this exercise of judgment, the licensee conformed to standards prescribed by the Commission as well as its own policies regarding suitability.

29 F.C.C.2d at 354. In *Oliver R. Grace*, 22 F.C.C.2d 667 (1970), the Commission, recognizing that section 326 of the Communications Act prohibited it from censoring broadcast matter, held that program choice was the responsibility of the licensee; the licensee was required to ascertain and reasonably serve the needs and interests of his community; and the charge that programs are vulgar or presented without due regard for sensitivity, intelligence, and taste, was not properly cognizable by the Commission, in light of the proscription against censorship. *Id.* at 668.

The importance of independent judgment by local licensees has been affirmed again and again by the FCC and the courts.[16] Perhaps the most important ruling for our purpose is the Commission's clarification memorandum regarding the original *Order*. There the Commission recognized that

> in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing. Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language.

[16] *See* Writers Guild of America, West, Inc. v. FCC, No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976); Report on Broadcast of Violent Indecent and Obscene Material, 51 F.C.C.2d 418 (1975); Network Programming Inquiry, 39 Fed. Reg. 26372 (1974). En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

Pacific Foundations, —— F.C.C.2d ——, 36 P & F Radio Reg.2d 1008, 1009 n.1 (1976). Thus the Commission indirectly admitted it had gone too far in banning "indecent" language from the airwaves. The Commission decided it would be better to trust the licensee to exercise judgment, responsibility and sensitivity to the community's needs, interests and tastes. *Id.*

Previously the Commission has readily admitted that its authority in the area of profane, obscene, or indecent language is governed by federal statutes as interpreted by the courts. The FCC has recognized that it must perform its duties in this area without infringing upon constitutional guarantees of freedom of speech and of the press, *Columbia Broadcasting System, Inc.*, —— F.C.C.2d ——, 21 P & F Radio Reg.2d 497 (1971), and without violating the statutory obligations of section 326 of the Communications Act. It must continue to do so.

We do not find it necessary to determine whether the term "indecent" can be more narrowly defined than the term "obscene". The FCC's position is that "indecent" language may be distinguished from "obscene" language in that it lacks the element of appeal to prurient interest and that when children are in the audience it cannot be redeemed by a claim that it has literary, artistic, political or scientific value. *Order* at 98.

This question has confronted other courts but there have been no definitive resolutions as yet. In *Gagliardo* v. *United States*, 336 F.2d 720 (9th Cir. 1966), the Ninth Circuit left open the question whether indecent, as used in section 1464, could be defined differently from obscene. Although the question of whether indecent might mean something different from obscene was raised in *Tallman* v. *United States*, 465 F.2d 282 (7th Cir. 1972), it was not resolved since the case had only been tried on

the theory that the defendant had uttered obscene language. The question was considered only tangentially in *United States* v. *Smith*, 467 F.2d 1126 (7th Cir. 1972), where the court reversed a conviction under section 1464 on the grounds that the jury had not been instructed as to the meaning of the statutory terms profane and indecent, even though the case had been presented to the jury under an indictment charging the defendant with uttering obscene, indecent and profane language. In reversing the conviction, the court did not suggest in what way, if at all, indecent language might differ from obscene language. It is evident therefore that the term indecent has never been authoritatively construed by the courts in connection with section 1464. Since we feel section 326 of the Communications Act is dispositive of this appeal we do not find it necessary to resolve this difficult question.

Unquestionably the Commission's *Order* also raises First Amendment considerations. The Commission recognized that Congress had prohibited it from engaging in censorship or interfering "with the right of free speech by means of radio communication." [17] In the *Order*, the Commission contends that because of its unique qualities the broadcast medium is not subject to the same constitutional standards that may be applied to other less intrusive forms of expression.

There is no doubt that the regulatory authority of the FCC encompasses more than the technical engineering aspects of the broadcast medium. Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, including broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act.

The requirements of the First Amendment relating to obscenity are found in *Miller* v. *California*, 413 U.S. 15

[17] 47 U.S.C. § 326 (1970).

(1973). In *Miller*, the Court set forth a subjective standard by which the trier of fact could determine whether material was obscene. The standard developed by the Court involves: a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and c) artistic, political or scientific value. *Miller*, 413 U.S. at 24.

Applying the *Miller* standard to the language used in the Carlin monologue, it is clear that although the language is crude and vulgar by most standards it is not obscene. The FCC agrees. *Order* at 98. As used, the words do not appeal to the prurient interest.[18] They are merely crude statements and are not used to titillate. Furthermore, the words prohibited by the *Order* may often be connected with programs in the public interest, e.g. plays and live news broadcasts. Thus, these words quite possibly could have literary, political or artistic value. Therefore this non-obscene speech is entitled to First Amendment protection.

The Commission claims an exception from First Amendment requirements in order to carry out its duty to promote the use of radio communications in the public interest. The basis of this claim is that the broadcast medium is unique. Assuming, arguendo, that the FCC has the power to prohibit non-obscene speech from being broadcast, the statute or order instituting such a ban must not be overbroad or vague. *See Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976). As will be illustrated, the *Order*, in its application of Section 1464, suffers from overbreadth and vagueness.

In *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), the Court held that rigorous constitutional standards apply when government attempts to regulate ex-

[18] *See* App. A at 10-12.

pression. Furthermore, when the government, acting as censor, undertakes selectivity to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Id.* at 209. Indeed, when First Amendment freedoms are at stake, the Court has repeatedly emphasized that precision of drafting and clarity of purpose are essential. *Id.* at 217-18.

The FCC's regulation of speech per its *Order* fails to meet the rigorous standards of the Supreme Court. A look at *Erznoznik* will help illustrate why. There a municipal ordinance made it unlawful for a drive-in theater to exhibit any motion picture in which the human male or female buttocks, human female bare breasts or human bare pubic areas were shown. The city attempted to sustain the ordinance as an effort to protect children. The Court held that minors are entitled to First Amendment protection and only in relatively narrow, well-defined circumstances may the government bar public dissemination of protected materials to them. *Erznoznik*, 422 U.S. at 212-13. The Court found the ordinance overbroad in that it sweepingly forbid the display of all films containing any uncovered breasts or buttocks, irrespective of context or pervasiveness. *Id.* at 213. Mr. Justice Powell, writing for the majority, stated that

> [s]peech that is neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

422 U.S. 213-14.

The situation in this appeal is quite similar to that in *Erznoznik*. The *Order* prohibits the broadcast of seven words at times of the day when there is a reasonable risk that children will be in the audience. Thus, the *Order* sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational

they may be. For instance, the *Order* would prohibit the broadcast of Shakespeare's *The Temptest or Two Gentlemen of Verona*. Certain passages of the *Bible* are also proscribed from broadcast by the *Order*.[19] Clearly every use of these seven words cannot be deemed offensive even as to minors. In this regard the *Order* is overbroad. It is not saved by the attempted clarification, for that order would only permit the words to be broadcast on live news shows or very late at night.[20]

In addition, the *Order* is vague in that it fails to define children. Need a nineteen year old and a seven year old be protected from the same offensive language? The Supreme Court has held that in assessing the requisite capacity of individual choice the age of the minor is a significant factor.[21] The *Order* does not even consider age as a factor, much less a significant one.

The Commission also attempts to justify its *Order* by claiming that, due to the intrusive nature of broadcasting, a captive audience is present. This argument is persuasive when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. However, as the Supreme Court noted in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), "[t]he radio can be turned off."

Cohen v. *California*, 403 U.S. 15 (1971), is also analogus to the present situation. Cohen was convicted of violating California Penal Code Section 415, which prohibits "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." Cohen had walked in a public corridor of the Los Angeles County Courthouse wearing a jacket inscribed with a four-letter word. California

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[19] In addition, works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift and the Nixon tapes, would not be allowed to air.

[20] Pacifica Foundation, *supra* note 8.

[21] Rowan v. Post Office Dept., 397 U.S. 728 (1970).

argued that the state may act to protect the unwilling or unsuspecting viewers from unavoidable exposure to such language. *Id.* at 21. This reasoning is similar to the FCC's expressed desire to protect the unsuspecting dial scanner from crude, offensive programming. In *Cohen*, the Court held that government control of objectionable speech can be tolerated only when substantial privacy interests are being invaded in an essentially intolerable manner. 403 U.S. at 21. Such an invasion had not occurred in *Cohen*, the Court found, because the offensive expression had occurred in public and because citizens could avoid it easily by averting their eyes. *Id.* Likewise, one can argue an intolerable invasion of privacy would not occur in the broadcast setting. Privacy expectations, even in the home, diminish when listeners choose to gain access to a public medium.[22] The dial scanner may avoid exposure simply by turning the dial. The Commission itself has recognized that listeners do not possess any right to be free from all unpleasantness.[23] In its effort to shield children from language which is not too rugged for many adults the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for children. The Commission's *Order* is a classic case of burning the house to roast the pig. *See Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

As defined by Congress, and refined by the FCC and the courts, public interest has always been understood to require licensees to offer some balance in their program format. *See Renewal of Standard Broadcast and Television License*, 14 F.C.C.2d 1, 8 (1968). Obviously balanced programming requires more than just programs suitable for children. Speech cannot be stifled by the gov-

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[22] *See Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975).

[23] Clarification of Section 76.256 of the Commission's Rules and Regulations, 59 F.C.C.2d 984 (1976).

ernment merely because it would draw an adverse reaction from the majority of the people. *Bazaar* v. *Fortune*, 476 F.2d 570, 579 (5th Cir.), *modified*, 489 F.2d 225 (1973).

The Commission assumes that absent FCC action, filth will flood the airwaves. Thus the Commission argues that the alternative of turning the dial will not aid the sensitive person in his efforts to avoid filthy language. The *Order* provides no empirical data to substantiate this assumption. Moreover, the assumption ignores the forces of economics and of ratings on the substance of programming. Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears.[24] Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills.[25] If they are correct, and if the Commission truly seeks only to enforce community standards, the market should limit the filth accordingly.[26]

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[24] *See Filthy Words, supra* note 18, at 615.

[25] *Id. citing* N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET, 20-21 (1967); N. MINNOW, EQUAL TIME, THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST.

[26] *See Filthy Words, supra* note 18, at 615.

As a final word we take note of a news account which, under the headline "Swearing by British Rock Band Enrages Television Viewers", reported the reaction of the British television audience to a broadcast containing filthy language. According to the report members of a rock band had used a string of obscenities on a London television program which had aired at 6:00 p.m. (The Washington Post, December 3, 1976, Style section, at 7, col 2) Following the broadcast thousands of angry calls jammed the switchboard at Thames Television Studios and thousands of others were received by the London newspapers in protest of the broadcast. Thames Television broadcast an apology later the same evening and the host of the program planned to make a personal apology on the air the following evening. In this instance it seems rather clear that

CONCLUSION

As we find that the Commission's *Order* is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. § 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its *Order* is overbroad and vague, therefore we must reverse the *Order*. We should continue to trust the licensee to exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes. To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.

So ordered.

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the London community was offended by what it had heard and that its reaction thereto stemmed any tide of filth that may have been headed its way.

BAZELON, *Chief Judge, concurring*: Although I agree with the result reached by Judge Tamm, I believe it is necessary to determine whether the Commission's *Order* abridges the First Amendment. I will discuss why this issue must be reached and then explain why the Commission's definition of "indecent" speech is unconstitutional.

I.

Judge Tamm concludes that the Commission's definition of "indecent" must be invalidated because it authorizes censorship forbidden by 47 U.S.C. § 326. Section 326 provides that nothing in the Communications Act shall be understood as giving the Commission "power of censorship" or authority to "interfere with the right of free speech." I agree with Judge Tamm that the Commission has censored.[1] The Commission has banned the broadcast of certain words during all but the late night hours, and possibly during those times as well.[2] The statute is

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[1] Unfortunately, I am unable to agree with Judge Tamm's related conclusion that the Commission customarily honors the limitations on its authority to regulate constitutionally protected speech. *See* WUHY-FM, 24 F.C.C.2d 408 (1970); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *recon. denied*, 34 F.C.C. 101 (1963), *affirmed on other grounds sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). *See also* Armond J. Rolle, 31 F.C.C.2d 533 (1970); the "raised eyebrow" harrassment of KRAB-FM in Jack Straw Mem. Foundation, 21 F.C.C.2d 833, *hearing ordered on recon.*, 24 F.C.C.2d 266 (1970), *license renewed*, 29 F.C.C.2d 334 (1971); Mile High Stations, Inc., 28 F.C.C. 795 (1960); WREC Broadcasting Service, 19 F.C.C. 1082 (1955); Note, *Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscenity*, 61 VA.L.REV. 579 (1975); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343, 1349, 1359-68 (1970), and cases cited. Ironically, one case where the Commission honored the limitations on its authority involved the same licensee, Pacifica Foundation, 36 F.C.C. 147 (1964).

[2] The ban is not limited to words "as broadcast," as the dissenter asserts, (draft at p. 1-2), for the *Order* provides that language that is indecent under the Commission's standard may never be broadcast when children are likely to be listening. Instead of merely considering the words "as broadcast," the Commission adopted a

thus facially violated, even though the ban is not absolute (as the Commission puts it, objectionable speech has merely been "channeled" into certain hours).[3] By its terms, § 326 is not limited to rules that totally ban the broadcast of certain materials; it bans any Commission

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legislative-type rule which it then applied to the facts of the case. As the Commission itself noted, it issued a declaratory order in this case because such a procedure is "admirably suited to terminat[ing] the present controversy . . . and to clarify[ing] the standards which the Commission utilizes to judge 'indecent language.'" 51 F.C.C. 2d at 434. It is true, though, that the adopted rule may not be applied at all times. During the late night hours, the *Order* cryptically states, a "different standard *might conceivably* be used." 51 F.C.C.2d at 433 (emphasis added). The *Order* does not specify at what time the number of children in the audience will be sufficiently low to permit use of a relaxed standard. However, the Commission's own statistics show that in Washington, D.C., teenagers comprise 14.1 percent between 11:00 p.m. and midnight. *In re* WUHY-FM, 24 F.C.C.2d 408, 411 n.6 (1970). The Commission also found that in New York and Los Angeles, children of ages 11-17 comprise 13 percent of the 9:00 to 11:00 p.m. television audience, while those 6-11 comprise 5 percent. *Id.* This vagueness supports invalidation, not affirmation of the Commission's action.

The dissent recognizes that the Commission cannot constitutionally apply its rule at night when parents can supervise their children. (Dissenting draft at 10-11.) Under this logic, a similar conclusion would presumably be required when children are in school, possibly except during lunch hour and recess. The Carlin monologue was broadcast at 2:00 p.m. on Tuesday, October 30. *Order* at 431.

[3] The Commission relies on Williams v. District of Columbia, 419 F.2d 638 (D.C.Cir. 1969), and Von Sleichter v. United States, 472 F.2d 1244 (D.C.Cir. 1972), for the proposition that regulation of offensive language should be governed by principles analogous to nuisance law. To the extent these cases permit a "nuisance" statute which proscribes words not obscene under Miller v. California, 413 U.S. 15 (1973), *see* text accompanying notes 7-9, *infra*, I think they are overruled by Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974), and Gooding v. Wilson, 405 U.S. 518 (1972). In any event, the Commission misapprehends the meaning of "nuisance" as used in those cases. *Williams* and *Von Sleichter* do not hold that offensive words are a nuisance per se that can therefore be regulated. Rather, they relied heavily on the context in which the words were uttered, distinguishing the case of a stonemason who, after dropping a stone on his foot, utters swear-words that can publicly be heard, from the case of a person who verbally, rather than physically, assaults a person in a public place.

censorship.[4] Indeed, channeling may have substantially the same effect as an absolute ban. Channeling material into a small enough time slot would prevent many stations from airing that material[5] and would effectively make it unavailable to many potential listeners.[6]

However, determining that the Commission has violated the literal command of § 326 does not, as Judge Tamm assumes, end the matter. Although the language of § 326 is very broad, the scope of that section is apparently limited by 18 U.S.C. § 1464 and 47 U.S.C. § 503(b)(1). Section 1464 provides criminal punishments for "[w]hoever utters any obscene, indecent, or profane language by means of radio," and § 503(b)(1) empowers the Commission to impose forefeitures on licensees who violated § 1464. In *Illinois Citizens Committee for Broadcasting* v. *F.C.C.*, 515 F.2d 397 (D.C.Cir. 1974), the petitioners claimed that an obscenity forfeiture assessed by the Commission under the latter provisions violated both the First Amendment and § 326.[7] This court found that the Com-

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[4] The Senate Report regarding the 1948 amendment to § 326 states:

> [S]ection 326 . . . makes clear that *the Commission has absolutely no power of censorship* over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio.

S.REP. No. 1567, 80th Cong., 2d Sess. 13014 (1948) (emphasis added).

[5] Amicus curiae, Committee for Open Media, San Francisco Chapter, asserts that roughly one-half of the nation's AM licensees (2,294 out of 4,488) operate only during the daytime. (Am.Br. at 18.)

[6] If material could only be shown after midnight, it would be missed by any people who have already gone to sleep. According to Nielsen, 70 percent of television households watch television between 9:00 and 10:00 p.m., 46 percent at 11:00 p.m., and 25 percent at midnight. *Nielsen Television, 1975*, p. 7.

[7] It is not entirely clear that the Commission is authorized to impose a forfeiture under § 503(b)(1) without a prior jury determination that § 1464 has been violated. The *Illinois Citizens Committee* court did not reach that issue. That appeal had been brought

mission had properly found that the program was constitutionally unprotected obscenity under *Miller* v. *California*, 413 U.S. 15 (1973). The forfeiture was upheld without comment on whether § 326 barred the Commission's action. The clear implication is that § 326 does not provide greater protection of speech than the First Amendment, at least with respect to offensive speech. If the court had thought otherwise, it could not have upheld the forfeiture simply by finding that the speech in question was unprotected under the First Amendment. Thus, to determine whether the Commission may regulate speech within its definition of "indecent," it is necessary to determine first whether such speech would be protected by the Constitution in other media; and if so, whether the unique character of broadcasting justifies the proposed expansion of government speech control.[8]

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by a citizen group, rather than the fined licensee, and the court concluded the group lacked standing to raise the issue. 515 F.2d at 403 n.13. The issue was not urged on this appeal. I merely note in passing that originally, the FCC was given enforcement powers over obscene broadcasts. *See* Duncan v. United States, 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). In 1948, the prohibition on obscene broadcasts was moved to Title 18 and nothing in Title 47 authorized the FCC to consider obscenity in a forfeiture proceeding. In 1960 Congress added § 503 to Title 47, Public Law 86-752, 74 Stat. 889. It was not stated whether the FCC was to have coordinate enforcement power with the Department of Justice. In any event, imposition of a fine would have been preferable to the "raised eyebrow" tactic the Commission used here. The chilling effect of "associating" a finding of violation and threatening future unmentioned sanctions if the licensee's behavior does not improve is unmeasurable.

[8] Although the Commission evidently assumes that § 1464 authorizes it to assert control over speech that would be forbidden in other media, 51 F.C.C.2d at 432, neither the text nor the legislative history of § 1464 supports this view. But regardless of Congress' intent in passing § 1464, the grant of power to the FCC cannot exceed the bounds of the First Amendment. I will assume that the First Amendment sometimes may permit government to regulate broadcast speech more tightly than other speech, and that § 1464 empowers the Commission to assert the maximum amount of control over offensive speech permitted by the Constitution. On these assumptions it is not necessary to define all the modifications, assuming there are any, in traditional First Amendment principles that may be justified by the unique character of broadcasting. It is only necessary to determine whether the additional regulation embodied in the Commission's definition of "indecent" is permissible.

II.

Several years ago, I felt compelled to write that "the FCC has demonstrated what one can most charitably describe as a total ignorance of the constitutional definition of obscenity." *Illinois Citizens Committee*, *supra*, statement of Bazelon, Chief Judge, as to why he voted to grant rehearing en banc, 515 F.2d at 418. Unfortunately, this case would seem to confirm that view. The Commission's definition of "indecent" speech that may be banned from the air-waves is massively overbroad under *Miller* v. *California*, 413 U.S. 15, *rehearing denied*, 414 U.S. 81 (1973). Nor has the Commission demonstrated why offensive speech that otherwise would be protected may be regulated at all when broadcast over the airwaves —or, specifically why the additional restrictions imposed are tailored to serve the justifications relied on for regulation.

Regulation of obscenity has produced "a variety of views among the members of the [Supreme] Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring and dissenting). In *Roth* v. *United States*, 354 U.S. 476 (1957), a majority of the Court, although aware that "ideas having even the slightest redeeming social importance . . . have the full protection" of the First Amendment, concluded that there was a category of obscene speech that could be freely regulated because it lacked redeeming social importance. 354 U.S. at 484-85. After *Roth*, a majority of the Court retained the belief that obscene speech lies outside the First Amendment, the Court dividing

over the difficult task of formulating a standard for distinguishing obscenity from that which is merely offensive. In the absence of a majority test, the Court initiated the practice, utilized thirty-one times, of summarily reversing convictions for the dissemination of materials that at least five Justices, applying their individual tests, found to be constitutionally protected. *Redrup* v. *New York*, 386 U.S. 767 (1967); *Miller*, 413 U.S. at 22, n.3. The Chief Justice believes this division of views "is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression." *Miller*, 413 U.S. at 22-23.

The Supreme Court's most recent attempt to resolve this uncertainty came in *Miller* v. *California*, *supra*. Acutely aware of the dangers inhering in any suppression of expression, the Court stated that the realm of permissible regulation must be "carefully limited." 413 U.S. at 23-24. A jury may find a work obscene "under contemporary community standards" only if the work (1) when taken as a whole (2) appeals to the prurient interest, (3) portrays sexual conduct in a patently offensive way (4) and lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.[9] The Court further held that obscenity could be regulated only under a specifically defined law,[10] as written or authoritatively con-

[9] The fourth prong represents the major departure from prior case law. Previously, proof of obscenity required establishing that the material was "utterly without redeeming social value," Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966). The *Miller* majority abandoned this strict test on the ground that it required the prosecution to do the impossible, namely, to prove a negative. 413 U.S. at 22.

[10] The *Miller* framework was followed in companion cases to assess the validity of federal regulation, United States v. 12 1200-Ft. Reels of Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

strued.[11] The Court said it had limited obscenity regulation to materials that "depict or describe patently offensive, hard core sexual conduct." *Id.* at 27. *See also*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 69 (1972).

The Commission did not find that the Carlin monologue was obscene under *Miller*. Rather, it found that certain words repeated in the monologue were "indecent."[12] The Commission offered several justifications for "authoritatively construing" the statutory term "indecent," one of which was a desire to reformulate its earlier construction of that term in light of *Miller*.[13] Although the Commission alternatively argues that *Miller* is not the exclusive test for regulation of offensive language, *see* Section III *infra*, analysis of the Commission's definition must begin with *Miller*. To begin with, *Miller* establishes when

[11] To guide legislatures, the Court suggested two definitions of conduct that would satisfy the "patent offensiveness" prong of the test. The examples are:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. Judge Leventhal asserts that by including these examples the Miller Court was authorizing "a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent." (Dissenting draft at 4). This was not the Court's intent. Just one paragraph before it offered these examples of patently offensive behavior, the Court explicitly held that the standards for measuring obscenity are conjunctive—all must be met to suppress speech. By giving flesh to the meaning of "patent offensiveness," the Court was not abandoning this holding.

[12] In constitutional interpretation the customary deference to agency regulations is inappropriate. *See e.g.* National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (D.C.Cir. 1974).

[13] The Commission also cited *Illinois Citizens Committee*, *supra*, as a case that compelled reconsideration of an earlier definition of indecency. However, that case simply involved judicial review under *Miller*, the court expressly refusing to consider the constitutionality of that definition and application of the term "indecent." 515 F.2d at 403-04, n.14.

speech in other media may be regulated because it is offensive in a lewd or vulgar way, *see* note 22 *infra*. Furthermore, the Commission has in the past attempted to define indecency in terms of the Supreme Court's standard for obscenity, 51 F.C.C.2d at 433, and has theorized that unregulated, indecent speech will cause social harm similar to that which is commonly associated with unregulated obscenity.[14] Since the Supreme Court has held that the concerns underlying obscenity justify only limited regulation, regulation of indecency must be subject to similar restraints absent other, compelling justifications.

Judge Leventhal's dissent is based in part on his view that the Commission attempted "to define 'indecent' in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller*." (dissenting draft at 3). Although the motivations for regulating "indecent" and obscene speech do seem similar, the Commission's definition of indecency is massively over-broad under *Miller*. In fact, the Commission's definition disregards every *Miller* requirement but one.

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[14] The Supreme Court has never definitively explained the justification for regulation of obscenity. Professor Kalven listed five possible justifications, all of which he found troubling;

> (1) the incitment to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; (4) the advocacy of improper sexual values; and (5) the impact of obscenity on character and hence, slowly and remotely, on conduct.

Kalven, *Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev., 1. Little would be served by charting the history of the Supreme Court's acceptance or rejection of these and conceptually similar concerns. All that bears noting is the similarity of the Commission's fears regarding unregulated indecent speech:

> Obnoxious, gutter language describing these matters [sexual and excretory activities or organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions. . . .

51 F.C.C.2d at 433. The Commission offered no empirical support for this proposition.

To begin with, the Commission does not test the "indecency" of speech under "local community standards," but rather on the basis of what it terms "contemporary community standards for the broadcast medium." 51 F.C.C. 2d 433. The search for a national standard is understandable. Justice Brennan's argument, rejected in *Miller*, that a national standard of obscenity is appropriate under a national constitution is telling. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 193-95. And *Miller* can be read as merely holding that application of local standards is constitutionally permissible rather than constitutionally required. 413 U.S. at 30-39. Finally, it may be that only a national standard is administratively feasible for the Commission. When scrutinized closely, however, the Commission's national standard appears chimerical. The Commission never solicited a jury verdict or expert testimony.[15] Nor did it rely on polls or letters of complaint.[16] The Commission simply recorded its conclusion that the words were indecent, thereby creating the suspicion that its national standard is in fact either the composite of the individual Commissioner's standards or what they suppose are the national standards.

The Commission's definition of indecency also disregards or distorts each of the other *Miller* requirements. First, appeal to the prurient interest is not to be considered. Second, a work is not judged as a whole. Rather, a work is banned if it contains "obnoxious, gutter language" that could be used offensively to describe sexual

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[15] Although a jury verdict is evidently not required in obscenity cases in general, Alexander v. Virginia, 413 U.S. 836 (1973); *Illinois Citizens Committee, supra*, 515 F.2d at 406, it would seem to be an exceptionally sturdy mechanism for soliciting community standards.

[16] I seriously doubt, in any event, that letters of complaint would provide reliable guidance as to what offends national standards of obscenity. Since a person is more apt to write a letter concerning a broadcast he finds offensive than one he does not, even a significant number of complaints might only reveal the sentiments of only a small minority of viewers.

or excretory activities or organs. 51 F.C.C.2d 433.[17] Finally, a work containing indecent language cannot be broadcast even if the entire work has tremendous overriding literary, artistic, political or scientific value. *Id.*[18]

The only *Miller* requirement observed by the Commission is that the banned language be patently offensive. But uprooting this element from the others distorts its meaning. Under the Commission's definition, its *Order* could not itself be read over the airwaves even though it is not obscene under *Miller*. The *Order* has no appeal to the prurient interest and, as a whole, has serious value. Despite this, it would be banned because it contains words the Commission claims "debas[e] and brutaliz[e] human beings by reducing them to their mere bodily functions." 51 F.C.C.2d at 433.

The Commission's definition of indecent speech that may be freely regulated thus goes well beyond *Miller* and is prima facie unconstitutional, notwithstanding the Commission's attempts to minimize the significance of the *Order*. In addition to its point about channelling, *see* text and notes at notes 1-6 *supra*, and its claim that only a few words will be affected, the Commission disclaimed any intent "to stifle robust, free debate." 51 F.C.C.2d at

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[17] Carlin's use of the "dirty words" was designed in part to demonstrate that they have acquired many popular meanings, apart from their literal meanings. For example, the phrase "I'm shit-faced" has nothing to do with an excretory activity or organ. It means, "I am drunk." The irony of the *Order* is that non-'obnoxious" synonyms for the dirty words (such as "feces" for "shit") are not banned even though such synonyms are only understood in their literal, "obnoxious," sense.

[18] Judge Leventhal argues that judicial review of Commission obscenity determinations compensates for the missing jury because

> [j]udicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific value.

(dissenting draft at 9). This statement is puzzling because, except possibly during the late night hours, a work containing indecent speech is banned regardless of its social value. 51 F.C.C.2d 433.

434. The implication is that only words and not ideas are being suppressed. However, the Supreme Court has rejected this very argument. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California*, 403 U.S. 15, 26 (1970). Since words "are often chosen as much for their emotive as cognitive force," *id.*, a person's choice of words is an important and protected element of the overall message sought to be communicated.

The Commission euphemistically characterizes its definition of indecency as "variable obscenity," citing *Ginsberg* v. *New York*, 390 U.S. 629. Under variable obscenity, the state can regulate dissemination of material to children that is obscene as to them, though not obscene as to adults. Variable obscenity "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . 'of such minors.'" *Ginsberg*, 390 U.S. at 628, citations omitted. Even assuming that variable obscenity can be regulated under § 1464, the Commission's definition of indecency is not a proper application of that concept.[19] To illustrate, the Commission did not purport to find that the Carlin monologue, when taken as a whole, appeals to the prurient interests of minors or that it was without serious value to minors. And even if the Commission had properly found that the monologue came within this definition, that finding alone would not justify absolute or near absolute suppression; the material might not be obscene as to adults. Regulation of speech that is obscene as to children but that adults are constitutionally entitled to hear would present difficult problems of accommodation, problems that the Commission has not squarely faced because of its assumption that its broad regulation of indecent speech is constitutional.[20]

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[19] *See* note 30 *infra*.

[20] The *Order* bans indecent speech whenever it is "reasonably likely" that children will be in the audience, which is all but the

In sum, the tight limits on obscenity regulation carefully formulated by the Supreme Court in *Miller* have been thoroughly disregarded. The Commission's definition can be affirmed only if, as it alternatively argues, there exists an additional category of offensive speech that is unprotected when broadcast.

III.

According to the Commission, certain qualities unique to the broadcast medium justify suppression of otherwise constitutionally protected speech.[21] Conceptually, the Commission's claim is that speech meeting its definition of "indecent" constitutes, when broadcast, an additional previously unrecognized category of unprotected speech.[22] No

late night hours. Consequently, protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep. *See* Young v. American Mini Theatres, 96 S.Ct. 2453, 2455 (1976) (Powell, J., concurring). *See* note 30 *infra*.

[21] 51 F.C.C.2d at 432. The Commission relied on the following language from Burstyn v. Wilson, 343 U.S. 495, 502-03 (1952):

> [E]ach method [of expression] tends to present its own peculiar problems.

The Commission evidently concludes from this statement that different First Amendment standards govern regulation of speech in different media. However, the entire passage reads:

> [E]ach method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary.

[22] Supreme Court authority suggests that obscenity is to be the sole category of speech that is unprotected because it may offend the sensibilities of listeners. First of all, the Court's twenty-year struggle to define obscenity suggests that the Court does not intend to recognize an additional category under a different heading. Furthermore, beginning with *Roth*, the Court has used the term "obscenity" as a legal short-hand to describe what government may constitutionally regulate under statutes that proscribe, for example, "obscene, lewd, lascivious, or filthy [books] of an indecent character." *Roth*, 354 U.S. at 476, n. 1. *See, e.g.*, Hamling v. United States, 418 U.S. 87 (1974); United States v. 12 200 Ft. Reels of Super 8 mm Film, 413 U.S. 123 (1973); Manual Enterprises, Inc. v.

single Supreme Court decision directly forecloses this argument. However, considerable guidance is contained in the several opinions in which the court has considered conceptually similar justifications. All of the relevant case law directly opposes the action under review.

Day, 370 U.S. 478 (1962). Furthermore, there is an abundance of dicta in the Supreme Court's cases supporting this suggestion. *Miller* furnishes several examples:

> The States have a legitimate interest in prohibiting dissemination of exhibition of obscene material . . . . It is in this context that we are called upon to define the standards which must be used to identify . . . [what] a state may regulate.

413 U.S. at 19-20.

> We acknowledge, however, the dangers inherent in undertaking to regulate any form of expression, State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.

Id. at 23-24. And:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . . .

Id. at 27.

The implication of these and similar statements is that permissible regulation of offensive speech is co-extensive with *Miller*.

Finally, in several cases, perhaps best represented by Cohen v. California, 403 U.S. 15 (1971), the Court has overturned convictions based on offensive speech. In *Cohen*, a young man was prosecuted for walking through a courthouse wearing a jacket bearing the slogan "fuck the draft" and was convicted under a California statute that proscribed "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person . . . by offensive conduct." Finding that the case did not involve obscenity, fighting words, a captive audience or any other category of speech that may be regulated, the Court was squarely faced with the question of whether the state could regulate words simply because they were offensive. The Court stated that offensive language was a necessary side effect of promoting the broader First Amendment value of open-ended debate and that the "principle [of selective suppression] contended for the State seems inherently boundless." 403 U.S. at 25. It concluded that Cohen's conviction was unconstitutional. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (display of nudity on a drive-in movie screen); Lewis v. City of New Orleans, 415

A. Offensive speech may offend the privacy interests of unconsenting adults in their homes

Two of the characteristics cited by the Commission are so closely intertwined that they should be considered together. The Commission fears that "unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast." It then observes that radio receivers are typically found in the home, where privacy interests are especially high, citing *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970). Since warnings can be aired prior to the broadcast of offensive material, the Commisison evidently believes an adult listener should be able to indiscriminately scan the dial without chancing upon a program, even momentarily, he finds offensive.[23]

"The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205-210 (1974). Nevertheless, the Supreme Court has consistently held that the First Amendment generally prohibits government from "cleans-[ing] public debate to the point where it is gramatically palatable to the most squeamish among us." *Cohen*, 403 U.S. at 25. In *Erznoznik*, for example, the Court held

U.S. 130, (utterance of vulgar epithet); Hess v. Indiana, 414 U.S. 105, (utterance of vulgar remark); Papish v. University of Missouri Curators, 410 U.S. 667, (indecent remarks in campus newspaper); Brandensburg v. Ohio, 395 U.S. 444, (utterance of racial slurs); or Kingsley Pictures Corp. v. Regents, 360 U.S. 684, (alluring portrayal of adultery as proper behavior). *Cf.* Young v. American Mini Theatres, Inc., 96 S.Ct. 2440 (1976), where a majority of the Court did not endorse the proposition that offensive though non-obscene expression may be regulated in some ways if not altogether banned.

[23] According to the Commission, millions scan the dial every day. Sonderling Broadcasting Corp., 27 P&F RR 2d 285, 288, *recon. denied* 41 F.C.C.2d 777 (1973), *affirmed sub nom.* Illinois Citizens Committee for Broadcasting, *supra*; WUHY-FM, Eastern Educ. Radio. 24 F.C.C.2d 408, 411 (1970).

that a city ordinance banning the showing of movies containing nudity on drive-in screens visible from the street could not be upheld in order to protect the sensibilities of involuntary passers-by. The Court said those who were offended could simply "avert their eyes." 422 U.S. at 211, 212. Similarly, in *Cohen*, *supra* n. 22, the Court held that offensive language could not be proscribed to protect the sensibilities of persons who might involuntarily be exposed to it:

> [T]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 23-34.

In *Cohen*, as in *Erznoznik*, the Court held the invasion on the privacy of unwilling viewers was not "intolerable" because of their ability to avert their eyes.

The Commission evidently believes that radio broadcast of offensive language constitutes an "intolerable invasion of substantial privacy interests." Radio waves are, as the Commission suggests, "intrusive" in some sense. They are "in the air" whether we like it or not.[24] But radio

[24] In its brief, the Commission quotes the following language from my opinion in Banzhaf v. FCC for the proposition that broadcast audience are "captive":

> Written messages are not communicated unless they are read; and reading requires an affirmative act. Broadcast messages are 'in the air.'

405 F.2d 1082, 1100-1101 (1968), *cert. denied*, 396 U.S. 842 (1969). *Banzhaf*, however, is totally inapposite. The *Banzhaf* court relied squarely on the announced policy of both the executive and legislative departments, which were themselves based on convincing evidence, that cigarettes are carcinogens. Hence the court weighed a relatively minor intrusion on free speech against an officially documented threat against life itself, 405 F.2d at 1097-99. Fur-

waves are not intrusive in the same sense as "racuous emissions of sound trucks blaring outside . . . residences," which was cited as an example of an "intolerable invasion" in *Cohen*, 403 U.S. at 21.[25] Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, bring it home and then switches it "on." Having done these things, having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik*; he can avert his attention by changing channels or turning off the set.[26]

There is language in *Cohen*, however, "that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g. Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970)." 403 U.S. at 21. Although relied on by the Commission, *Rowan* does not in fact justify its *Order*. As the enunciation of the relevant test, citation of *Rowan*, and discussion of examples in *Cohen* suggest, *id.* at 21-22,

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thermore, the case was not based on a captive audience rationale; the court merely suggested that a television viewer must make an affirmative effort to disregard the commercial interruptions on a program he is watching. *Id.* at 1100.

[25] The Court has in other cases added that while it is permissible to regulate the raucous emissions of sound trucks on the theory that people are entitled to have the tranquility and privacy of their homes protected from intrusions which they are themselves powerless to prevent, governmental regulation of the "time, place and manner" of expression must be content-neutral. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 99 (1972); Erznoznik, *supra;* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Saia v. New York, 334 U.S. 558 (1948); Martin v. City of Struthers, 319 U.S. 141, 151 (1943) (Murphy, J., concurring).

[26] In Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974), the Court noted, "The radio can be turned off, but not so the billboard or streetcar placard," *quoting* Packer Corporation v. Utah, 285 U.S. 105, 110 (1932).

the location of the unwilling listener is only one factor to be considered in determining whether speech is protected. Although a person *can* claim a greater privacy interest when at home, that interest is reduced when he "opens up his home" by turning on the radio. Indeed, when walking on the street one rarely receives prior warning of an offensive conversation.

Furthermore, the Commission's action is of an entirely different nature than that upheld in *Rowan*. There the Court upheld the constitutionality of a statute which enabled a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the householder.[27] *Rowan* enables a person who is offended by mail sent from a certain source to avoid further offense from that source. This privacy interest is similar to that naturally enjoyed by the radio listener—the right not to listen to stations he finds offensive. The *Rowan* Court noted that similarity of these interests when it wrote that invalidating the statute,

> would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.

397 U.S. 737. More importantly, as the *Rowan* Court noted, by empowering the homeowner to determine what mail he will not receive, Congress avoided the Constitutional problems involved in "vesting the power to make any discretionary evaluation of the material in a governmental official." *Id.* The Commission, by assuming this very power, has gone well beyond *Rowan*.

B. Presence of Children in the Radio Audience

The argument advanced most strenuously by the Commission is that the ban on "dirty words" is necessary to prevent "the exposure of children to language which most

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[27] 39 U.S.C. § 4009 (1964 ed., Supp. IV).

parents regard as inappropriate for them to hear." 51 F.C.C.2d at 433. The Commisison theorizes that regulation is necessary because parents will frequently be unable to shield their children from such programming. No one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults, *Ginsberg* v. *New York*, *supra*. However, it does not follow that the regulation under review is permissible.

First of all, the Commission incorrectly assumes that material regulatable for children can be banned from broadcast.[28] In *Butler* v. *Michigan*, 352 U.S. 380, (1957), the Court invalidated a state statute that absolutely banned the publication, sale or distribution of reading materials inappropriate for children. The Court said,

> The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society.

352 U.S. at 383-84.

The Commission's *Order* has substantially the same effect. Adults with normal sleeping habits will be limited to programs "fit for children." Should the Commission choose to regulate variable obscenity in the future, it must accommodate the right of government to regulate material that is obscene as to children with the rights of adults to hear speech protected as to them. If the Commission finds it impractical to accommodate these interests, any regulation must err on the side of under- rather than over-regulation. Any harm from under-

[28] Since the *Order* only states that a more relaxed standard "might conveivably be used" during the late night hours, *see* note 2 *supra*, I assume the Commission believes it could impose an absolute ban. Nevertheless, for the rest of this paragraph I will assume the Commission will allow "indecent" speech to be aired late at night.

regulation may be minimized by pre-program warnings and parental supervision. Any harm from over-regulation, on the other hand, is irremediable.

In any event the Commission has not shown that the proposed regulation is permissible even with respect to children. Its position is based on several undocumented assumptions. The most basic assumption is that most parents consider any mention of dirty words to be unsuitable for their children. On top of this, the Commission assumes that parents frequently are unable to control their children's listening habits. A critical additional assumption (which I find difficult to accept) is that parents are less able to control their children's access to television and radio than to such media as books and newspapers. If this assumption is unfounded, then the major support for the Commission's argument that radio-TV should be distinguished from other media for speech regulation purposes is groundless.

Moreover, even if valid, those assumptions do not validate the *Order* since it rests on the premise that the Commission may censor material found by parents to be objectionable for their children. This unprecedented assumption[29] "seems inherently boundless," *Cohen*, 403 U.S. at 25. Parents might also wish to shield their children from programs advancing controversial political or religious beliefs or programs discussing difficult contemporary problems such as abortion. If the Commission can act *in loco parentis* by banning dirty words because they are objectionable, then the same logic justifies a ban on these and other types of programs.

[29] The Commission improperly relies upon Wisconsin v. Yoder, 406 U.S. 205 (1972), where the Supreme Court held that an Amish parent's decision not to send his children to secondary school for religious reasons was constitutionally protected. *Yoder* recognizes that parents are entitled to make certain decisions respecting their children. This interest is infringed rather than promoted by the Commission's *Order* which replaces parental authority with governmental authority.

Many parents believe—and perhaps rightly so—that children should not hear programs containing dirty words, and they may, of course, prevent their children from doing so. However, the Constitution limits the government's power to select programming for children. Although government may adopt more stringent controls with respect to children than adults on the theory that children lack the full capacity for choice that is the presupposition of First Amendment guarantees, *Ginsberg* v. *New York supra, esp.* (Stewart, J. concurring), *at* 649-50, "[m]inors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik, supra,* 422 U.S. at 212. See also *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). In fact,

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable.

Erznoznik at 213-14.

Thus the *Order* is clearly overbroad insofar as it is based on protection of children. As noted above, *see* text and note at note 19 *supra*, the Commission cannot plausibly claim that speech meeting its definition of "indecent" satisfies the constitutional test of obscenity, even as adjusted for children. In order to find that dirty words were obscene as to children, the Commission would at least have to find that their use, in context, appeals to youthful prurient interest. This has not been done and, frankly, I do not see how individual words could ever be found obscene, even as to children.[30]

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[30] Ginsberg v. New York, *supra*, which established the principle that obscenity could be assessed in relation to children, was decided before *Miller*. In *Erznoznik* the Court observed it had not had occasion to determine the effect of *Miller* on *Ginsberg*. However, the Court stated that not all nudity could be regarded as obscene as to children, because to be obscene expression must be in some way erotic. 422 U.S. at 213, n. 10. This statement implies that a finding of variable obscenity requires at least that the offensive material be judged in context and found to be prurient. In fact, there is language in *Miller* suggesting that the presence of children does not justify any additional regulation of speech:

> This Court has recognized that the States have a legitimate interest in prohibiting dissemination of obscene material when the mode of dissemination carries with it a significant danger or of exposure to juveniles. (Cites omitted). *It is in this context*, that we are called on to identify obscene material that a state may regulate . . .

413 U.S. at 19-20 (emphasis added).

Nor can this broad restriction be justified by any other governmental interest pertaining to minors. In fact, the Commission's motivation in protecting children from dirty words is essentially that which *Erznoznik* forbids, namely a desire to shield children from what the legislature deems offensive.

In reaching this conclusion, I am not championing the "cause" of indecent speech. The use of dirty words on the air, like the prevalence of violence, is a serious concern. Without a heightened sensitivity of the media, the pressure on First Amendment values will continue to grow. Violence in programming, however, may be more objectionable than the use of off-colored language; after all, children do not learn to kill each other with dirty words. Nevertheless, the Commission recently refused to ban violence on television, citing First Amendment concerns. *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418, 420 (1975).

C. Scarcity of Spectrum Space

The final feature of broadcasting relied on by the Commission is the natural scarcity of broadcast channels. This reliance is misplaced. The ban on censorship in 47 U.S.C. § 326 reflects a Congressional judgment that scarcity does not justify content regulation. Indeed, al-

though scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.

The Commission relies on *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), where the Supreme Court upheld the constitutionality of the personal attack and political editorializing portions of the Commission's fairness doctrine. There the Court balanced the interests of broadcasters in freedom from control against the public's right to receive diverse viewpoints on matters of political importance. In this case, on the other hand, there is no divergence of First Amendment interests. The broadcasters' interest in freedom from content regulation is not incompatible with each member of the broadcast audience's interest in selecting his own programs and perhaps thereby attempting to influence the broadcaster's offerings. In fact, the *Red Lion Court* anticipated this situation when it wrote:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.

395 U.S. at 396.

D. Miscellaneous justifications

The Commission also advances several subsidiary justifications for its action that are easily put aside. First, as Judge Tamm observes, the fear that filth will flood the airwaves without Commission regulation ignores economics. Popular tastes should be sufficient to ensure that the populace is not inundated with programming it finds objectionable.

Nor can the Commission's actions rest on its statutory obligation to promote the larger and more effective use of

radio in the public interest. 47 U.S.C. 303(g). The Commission's statutory authority is not superior to the First Amendment. At most, specific components of the public interest can be relied on, as the Commission sought to do, to justify modifications in established First Amendment principles.

Finally, support for the Commission's action cannot be found in the fact government could have denied the public access to the airwaves altogether. I have long found such an argument puzzling. *See Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 67-68 (Bazelon, C.J., dissenting); Emerson, *The System of Freedom of Expression*, 660-61 (1970). Government also owns parkland and other facilities commonly used as public fora. Although the government may, in certain circumstances, forbid the use of certain locations altogether for public dialogue, any regulation it employs once it opens up a particular location for speech purposes must be content neutral. *Police Dept. of the City of Chicago* v. *Mosley*, *supra*, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969).

CONCLUSION

The impact of television [31] and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communications in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship. As Chief Justice Warren once observed, the impact of a particular medium constitutes no basis for subjecting that medium to greater suppression:

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[31] The Commission construes § 1464 as applying to spoken words that are broadcast. Thus § 1464 applies to television dialogue. The Commission has asked Congress to update the statute to refer explicitly to video depiction. *Report on Violen*[*ce*], *supra*, 51 F.C.C.2d at 424.

> This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

Times Film Corp. v. *City of Chicago*, 365 U.S. 43, 77 (1969) (Warren, C.J., dissenting).

LEVENTHAL, *Circuit Judge, dissenting*: The Commission's declaratory order was issued in FCC File No. BRH-13. *In the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI (FM) New York, New York.* The Declaratory Order consists of sixteen numbered paragraphs, followed by an Ordering paragraph. In the footnote I set out the Commission's *Conclusion*, which contains the three final numbered paragraphs, together with the Ordering paragraph.[1] The majority vacates the order. I dissent.

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[1] CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY-FM* and *Sonderling*. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger

The Appendix to this opinion contains the transcript of the George Carlin record. It may offend some sensibilities. But I think it important, especially because so many may be disposed to consider the matter in absolutist terms, just what material it is that the Commission has held was improperly broadcast in the afternoon. This transcript is written, and it may well be more heavy handed than the monologue as heard on the radio. But counsel have not complained that the transcript format distorts or fails to present the issues.

I

The majority opinions treat the FCC's order as though it prohibited any TV or radio broadcast which included one of the seven words identified in the FCC's paragraph

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and more effective use of radio in the public interest. 47 U.S.C. 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F.2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F.2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

14. The Commission held only "that the language *as broadcast* was indecent and prohibited by 18 U.S.C. 1464".[2] The words were identified as depicting "sexual activities and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media", and further identified as "prerecorded language with the words repeated over and over . . . deliberately broadcast." But over and above the Commission's focus on the deliberate repetition of these words, was a clear and crucial emphasis on the timing of the broadcast. It was vital to the order that the words were broadcast "in the early afternoon" when "children were undoubtedly in the audience." The order specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent particularly when children are in the audience" would not force on the general listening public ideas "fit only for children."

Commissioners Reid and Quello stated that in their view the declaratory order should have gone further and prohibited such language at any time of the day or night. That was a minority expression. Chairman Wiley concurred only in the result. Commissioner Robinson, joined by Commissioner Hooks, concurred on the ground of time limitation, as a reasonable measure "to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent." [3]

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[2] 18 U.S.C. § 1464 provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[3] Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hardbitten libertarians do not

In light of this array of concurrences, the Commission's decision must be read narrowly, limited to the language "as broadcast" in the early afternoon.

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find entirely uncongenial.[12] Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

IV. CONCLUSION

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force*. This agency, in my view, has the power to compel that co-existence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

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[12] Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in class of "backward" societies, *Ibid.* I hope we do not qualify for that exception.

II

Exposure to children marks a special enclave in the law of freedoms of publication. Even the dissent of Justice Brennan in *Miller* v. *California*, 413 U.S. 15, 47, abstained from discussing state power over distribution to juveniles. As to children, it is obvious that the state has more latitude to require that certain movies, which are not censored generally, should nevertheless not be exhibited in performances to which children under 16 are admitted. The problem is that radio-TV broadcasting cannot be handled in so tailored a fashion.

In regard to broadcasting, the probable presence of children in the radio audience is relevant to a determination of obscenity. So we held in *Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U.S.App.D.C. 166, 173, 515 F.2d 397, 404 (1975).

The FCC opinion under discussion refers to what is "indecent" rather than what is "obscene." If the term "indecent" were stretched to cover what would normally be included as, say, sacrilegious, it would depart too far from the context of section 1464.[4] But as I read the FCC's order, it reflects an effort to define "indecent" in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller*. In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling (Miller), save for an adaptation to bridge the difference posed by the characteristic of radio presentation.

The majority opinions seem to consider "indecent" as a novel concept in the law, which should in their view not be extended beyond control of the "obscene." They wholly fail to take account of one aspect of *Miller*, which has not been much analyzed but which seems to me to have been deliberate and significant. The pre-*Miller* rul-

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[4] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

ings had always defined "obscene" in terms of what appeals to the lewd and prurient interest, *e.g. Roth* v. *United States*, 354 U.S. 476, 487, the concept that had previously been defined. But *Miller* expanded on this—to include "patently offensive representations of . . . excretory functions." 413 U.S. at 25.[5] This is in substance a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent. And that is the *only* increment given to the term "indecent" in the FCC's opinion and order.

Mr. George Carlin is a comedian of stature, and a social satirist, but it is in the nature of social satirists to be provocative. He himself delivered his words as a biting commentary on what could *not* be heard on radio-TV, but he delivered them in a theater. A mature audience might appreciate not only the particular paradox, but the ongoing dilemma that every society has special vocabularies appropriate only for special groups, times and places. What the licensee did here was to broadcast them broadside, in houses and elsewhere; and to present the persistent, almost lavishly loving reiteration of the special words in an afternoon broadcast when children were likely in the audience. I cannot fault the FCC's order declaring that broadcast as indecent under 18 U.S.C. § 1464. TV-radio broadcasting has special access to the home, and home audiences are a primary target of the industry. In the home special considerations ap-

[5] The concept of appeal to the prurient interest had previously been justified in some quarters on the ground that the material might stimulate sexual activity. Obviously, the representation of excretory functions would not stimulate excretory activity. It might sexually stimulate some seriously disturbed persons, but so might any fetish, such as a shoe. While *Miller* and accompanying opinions discourse at length on the possible nexus of obscenity and antisocial behavior, in the last analysis they do not depend on a showing or assumption of antisocial activity, but rather reflect a judicial conception that the law may give sanctions to the community's effort to avoid degradation of its quality of life and imposition on the privacy of others. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973), referring to the view of Professor Alexander Bickel.

ply, with freedom from unwanted intrusion both by the government, *Stanley* v. *Georgia*, 394 U.S. 557 (1969), and by others presenting unwanted materials, *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970).

A concept like "indecent" is not verifiable as a concept of hard science. Its acceptance by and application by the FCC does not necessarily reflect, or depend upon, a determination by the FCC that this material would be dangerous to the children. What it reflects is a determination concerning a broad consensus of society, the view that the great bulk of families would consider it potentially dangerous to their children, and the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice. With the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family.

Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. In *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), there was a showing of a film in a drive-in theater, at night. Any children in the audience were not being reached at home. They had access only if, having been excluded from the theater, they sought out the film from a non-contemplated location. *Cohen* v. *California*, 403 U.S. 15 (1971), was a case of emphatic political speech, the otherwise offensive protest occurred in the courthouse, basically an adult locale, open only during the day. The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception—a mere click, without current purchase. Indeed there is passivity after the click, with TV-radio stations being frequently left to a dial position previously set, unless there is an "alert" of some kind.

III

A crucial reality, dominating the case at hand, is the widespread access of radio to children. Radio is relatively inexpensive in initial capital cost, and virtually a free good in terms of operating expense. Widespread freedom of selection of programs by children is not only a condition, it is often a necessity. Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsupervised during the day.[6] In this totality of conditions, one cannot wave away the radio-TV problem on the ground that the (mature) person can readily switch the channel.

It is no objection to the validity of the Commission's declaratory order that its protection will not be complete. It is likely that children will hear these words somehow, somewhere, and even at a relatively early age, but it makes a difference whether they hear them in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability.

It is argued that the FCC's order is meaningless, because many children listen to TV-radio unsupervised even late at night. A ban would not be proved invalid by a showing that in some homes the parents habitually use such language in front of their children. Similarly, a daytime ban is not invalid because some parents give

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[6] Smithsonian, Feb. 1977, p. 13 (noting that "most kids are latchkey children"). *See also* N.Y. Times, Feb. 10, 1977, at 39, col. 3 (City ed.). The most recent data appear in Bureau of the Census, Dep't of Commerce, *Marital Status and Living Arrangements: March 1976*, Series P-20 No. 306, at 7 (January 1977):

> Eighty percent of the children under 18 years old in 1976 lived in families with both of their parents present, a decline from 85 percent in 1970.

See also U.S. Dep't of Labor, *News Release* (February 25, 1977) (majority of children between ages of 6 and 17 have mothers in the labor force).

their children freedom in late hours. That does not show the ruling is futile, for it may still provide protection to a large part of the households of America. Nor is it sound to say that partial control must logically end in total prohibition, at all times and for all audiences. Licensees have the ability to make time distinctions. *See* In re *Pacifica Foundation*, 36 F.C.C. 147, 149 (1964) (noting that "Pacifica took into account the nature of the broadcast medium when it scheduled [programs with sexual themes or indecent language] for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum").

The abhorrence of Censorship is a vital part of our society. But there is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to First Amendment protection is not necessarily entitled to First Amendment protection in all places. *Young* v. *American Mini Theatres, Inc.*, 96 S.Ct. 2440 (1976). Nor is it necessarily entitled to such protection at all times.

Commissioner Robinson's apt citation of Justice Holmes[7] is rightly conjoined with a caution against the Ringing Phrase. We must beware of the distortion of doctrines and concepts that are pushed to extremes. In affirming the FCC's order, we would not be condoning a censorship that put the message of Mr. George Carlin off the air.[8] We would be authorizing reasonable steps

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[7] Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908). ("All rights tend to declare themselves absolute to their logical extreme.")

[8] Moreover, it seems to me implicit in the Commission's order prohibiting the language "as broadcast" that the Commission does not intend to ban from the afternoon air waves every work of literature which contains one of these words. The monologue broadcast here was an exploration of obscenity, "with the words repeated over and over." FCC Conclusion at ¶ 14. It was very different from the plays of Shakepeare or the novels of Fielding, which may occasionally include, in the course of dealing with some larger theme, a word customarily indecent, and would be so regarded if not redeemed by the literary, artistic, political, or scientific context.

that permit that message to find an audience, without pasting it on the youth. They are impressionable, and likely to savor and repeat what they hear of the forbidden, without the maturity to distinguish between the different vocabularies and mindsets that every society harbors for different times and places.

Smut may drive itself from the market, and confound Gresham. So Judge Tamm suggests. Judges cannot, however, premise that there is not really a market that will endure.[9] In any event, there is a problem of the transition period. Even the most earnest advocates of freedom accept the role of government in protecting those who lack capacity.

IV

It is appropriate to acknowledge some inexactness in the agency's approach, and to say that this is an abiding discomfort but not a brand of invalidity. Vagueness is to some extent inherent in the subject matter, and is heightened by a procedure, of rulings in particular instances, that presents problems but also has virtues. The Supreme Court's long struggle with obscenity cases reflects the underlying complexities, and those cases involved criminal sanctions. Nor is regulation of indecency

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[9] The British Broadcasting Corporation experience cited by Judge Tamm (at p. 18) may not be transportable. The British began with commercial domination of the airwaves, and recoiled from its excess to develop BBC as a government agency, with a tradition of independence from the executive, that would operate in the public interest without the need for operating profits. The United States began with government operation of airwaves, which Herbert Hoover resolved should never be captured by commercial interests. But it later determined to permit radio (and later TV) broadcasting to draw on the energy of private enterprise—and that prime mover demands the spark of private profit. Whatever pornography's claim to constitutional protection, its basic reason for existence is to make money in the market. And if some publishers or broadcasters are engaged in disseminating the interdicted as a matter of principle, then the disapproval of the majority will not be a barrier, and might even be a spur.

precluded by the administrative agency setting. *Miller* has language that features the value of a finding by a jury representing the community. Yet *Miller*'s continuation of an obscenity exception to freedom of press has been approved in other cases where there was no criminal prosecution and no jury.[10] I see no constitutional impediment either to an agency determination in the first instance, or to its use of an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review.

In the case of the Federal Communications Commission, there can be judicial review of any obscenity-indecency ruling at the instance of those who want to see and hear the material even if the licensee is ready to drop the matter. *Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U.S.App.D.C. 166, 515 F.2d 397 (1974). Judicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific values.[11] The court would further guarantee that any determination of obscenity or indecency reflects the "hard look" by the agency appropriate where broadcast freedom and choice is limited.[12] Finally the court would require that the agency fully respect the licensee's range of discretion, and not disapprove the licensee's action merely because the agency had a different view of the matter, but only because the

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[10] United States v. Twelve 200 Ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973); Alexander v. Virginia, 413 U.S. 836 (1973); Star v. Preller, 419 U.S. 955, *aff'ng mem* 375 F. Supp. 1093 (D.Md. 1974) (3-judge court).

[11] I would explicitly add "educational" values, see H. Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 ABAJ 1261, 1264 (1973).

[12] WAIT Radio v. FCC, 148 U.S.App.D.C. 179, 459 F.2d 1203, *cert. denied*, 409 U.S. 1027 (1972); Greater Boston TV Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

licensee had gone so far as to be marked for an abuse of his license.[13]

V

What we have before us is the Federal Communications Commission order declaring the invalidity of particular language "as broadcast." That carries with it the limitations of time and deliberate repetition identified by the FCC.

The limitation of time is the *afternoon.* I am aware that the FCC's only indication of acceptability for the broadcast referred to the late hours of the evening.[14] But the issue of what might be broadcastable in the early evening is not before us, and raises different considerations. That would be a time when there were large numbers of children in home audiences generally, but the issue could be raised that for homes where parents really care about such matters there would be at least one parent in a position to monitor the material heard and seen. A ruling expanding the zone of the broadcastable to adult levels might apply when the time of broadcast is such that the great preponderance of children are subject to parental control.

Under *Miller* matter is not "obscene" if it has literary, educational, artistic, political or scientific value, and accordingly is not "indecent" (under a Miller analogue test) if it has such value. But the fact that it has such value for adults does not mean it has such value in a broadcast geared to children—or in a broadcast where a substantial number of children are likely to be in the

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[13] Straus Communications, Inc. v. FCC, 174 U.S.App.D.C. 149, 530 F.2d 1001 (1976); National Broadcasting Co. v. FCC, 170 U.S.App. D.C. 173, 516 F.2d 1101 (1975), *cert. denied,* 424 U.S. 910 (1975). Compare Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring: "I know it when I see it. . .").

[14] In addition to the reference in ¶ 16, quoted in the first footnote of this dissent, there is also paragraph 12, preceding the conclusion, as follows:

audience without parental supervision.[15] A different question arises as to whether it may have such value for a broadcast during evening hours when children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children. Such a program may have serious literary, artistic, political or scientific value for its audience—assuming the exclusion from the audience (due to opportunity for parental control) of most of the children who by disposition, training or understanding, will be dominated by the blunt impact of the sexual and excretory words, and for whom the serious content will be nonexistent.

There are certain aspects in which the FCC's order may be subject to particular question—both as to words interdicted [16] and as to the duration of the time

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12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. Miller v. California, *supra.*

[15] In Ginsberg v. New York, 390 U.S. 629 (1968) the Court upheld a state law providing distribution to minors under 17 of material not obscene for adults. Justice Brennan's majority opinion holds the legislation could properly support parents in their discharge of their primary responsibility for children's well-being, including the assessment of sex-related material "according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' " *See* 390 U.S. at 639.

[16] If the case had been presented from the start in a diffent way, I would have remanded for further consideration, to make the rulings and standards more specific in order to provide more information for other licensees, which is the FCC's purpose. For one thing, I am not clear why the word "tit" is in the FCC's Index, because it is neither a sexual nor excretory organ. The fact that Mr. Carlin included it in his list of the verboten does not mean that the FCC

span.[17] Those are not the objections to the order that were perserved for this court. I would reserve those for another time—as calling for a modification of the FCC order, on objections duly presented, but not an all-out condemnation.

VI

As a judge of what the Constitution calls an "inferior" court, my duty is to apply *Miller* unless and until the Supreme Court modifies it. Given the independence of a legal commentator (see note 11), I have voiced my gravest doubts concerning the vitality of *Miller's* effort to resolve the "intractable" question of obscenity. But even my personal approach would let freedom ring with some muffle of time and place as a constitutional trade-off—to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified (see note 5, *supra*) as society's concern with the quality of its community life. As for children, even assuming that children's exposure to pornography is as inevitable as pornography itself, there is protection in disapproval, in the child's knowledge that

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must adopt his position. But I do not think there is any material legal objection to the ruling sustaining the complaint against petitioner, on the basis of its broadcast.

[17] Chief Judge Bazelon offers the thought that children are not home at 2 p.m. (page 2 n.2). That is *not* the objection put before the FCC or argued on appeal. That objection would merit proof and agency reflection—on such matters as exposure of pre-school age children, whether schools in the area served by the station let some children out before 2 p.m., etc. In this record, issue was not joined with the FCC's finding that 2 p.m. was a time when children were "undoubtedly in the audience." (Par. 14, quoted in note 1 of this dissent).

the pornography that is seen and heard is not approved by parents or society.[18] That much of a trade-off is likely to persist under *Miller*, even if that decision is modified. It leads me to affirm the FCC's effort to apply *Miller* in the context of daytime broadcasting—when the protection of children is a compelling state interest.[19] I respectfully dissent.

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[18] Compare the position of Professor Willard Gaylin, professor of psychiatry and law at Columbia University, presented in *The Prickly Problems of Pornography, Book Review of Kuh, Foolish Fig Leaves?* 77 Yale L.J. 579, 594 (1968):

> The child is protected in his reading of pornography by the knowledge that it is pornographic, that is, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement.
>
> If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego. The law is an instrument in the establishment of social behavior—and in the judging of it.

The foregoing was quoted in Justice Brennan's majority opinion in *Ginsberg* v. *New York*, 390 U.S. 629 at 642. When restating it recently, Professor Gaylin added: "The law, more than most lawyers seem to realize, is an ethical determinant and a moral force." W. Gaylin, *Obscenity*, Washington Post, Feb. 20, 1977, p. C-1.

[19] Illinois Citizens Committee for Broadcasting v. FCC, 169 U.S. App.D.C. 166, 174, 515 F.2d 397, 405 (1975); *See* Ginsberg v. New York, 390 U.S. 629 (1968).

APPENDIX 1

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu.

I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay. I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic

words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock is in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man, (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy, I can let my hair hang down now, shit. (laughter) Ha! So! Now the

word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you re full of shit myself. (laughter) He don't know shit from Shinola (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that. (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in a Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh. (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fel! in some shit, you know. (laughter) Hey, I'm shit-face.

(laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuc*k*. (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life —personality—dual, you know, whatever the the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love, (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you, (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Mad-fuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the

ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list, I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, its harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it, the twat stands alone, man, as it should. And two-way words. As, ass is okey providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight, and thank you also. (clapping, whistling)"

APPENDIX B

FCC 75-200

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. BRH-13

IN THE MATTER OF A CITIZEN'S COMPLAINT AGAINST
PACIFICA FOUNDATION STATION WBAI (FM),
NEW YORK, N.Y.

DECLARATORY ORDER

MEMORANDUM OPINION AND ORDER

(Adopted February 12, 1975;
Released February 21, 1975)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT; COMMISSIONERS REID AND QUELLO CONCURRING AND ISSUING STATEMENTS; COMMISSIONER ROBINSON CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER HOOKS JOINS.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in *Eastern Educational Radio* (WUHY-FM), 24 FCC 2d 408 (1970) and issued a notice of apparent liability which held "indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.[1]

[1] The Commission is empowered to impose sanctions on licensees who violate § 1464 of Title 18 of the United States Code which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C.A. 1464.

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in *WUHY*. Further, *Sonderling Corp.*, 27 RR 2d 285, *recon. denied* 41 FCC 2d 777 (1973) was affirmed sub. nom. *Illinois Citizens Committee for Broadcasing, et al.* v. *FCC*, D.C. Cir. No. 73-1652, decided November 20, 1974, and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.[2] In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene" language which was discussed by the Commission in *Sonderling Corp.*, *supra*.

THE COMPLAINT

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck,"

[2] The Court upheld the Commission's finding of obscenity against a radio call-in show which, during hours when the audience could include children, had broadcast explicit discussions of ultimate sexual acts in a titillating context. Accordingly, it did not have to "reach the question of the constitutionality of [the Commission's] interpretation and application of term 'incident.'" Slip Op. 10, n. 5. The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. 24 FCC 2d at 412.

"cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue," that "Any child could have been turning the dial, and tuned in to that garbage," and that "Incidentally, my young son was with me when I heard the above . . ."

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on October 30, 1973, states that it was recorded live at the Circle Star Theatre, San Carlos, California. The segment of the record to which the complainant obviously referred was Cut 5 of Side 2, titled "Filthy Words" and ran 11 minutes and 45 seconds. A verbatim transcript of this material is attached hereto as an Appendix and is incorporated herein by reference.

5. Review of this recorded monologue reveals that it consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . ." Thereafter there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

PACIFICA'S RESPONSE

6. On December 10, 1973, the complaint was forwarded to WBAI (FM) with a request for its comments. After receipt of the licensee's initial response, dated January 7, 1974, the Commission, on March 26, 1974, requested that it forward a recording or complete script of the program in question. In response, the licensee stated that the complaint was based on the language used "in a satirical monologue broadcast during the course of a regularly scheduled live program, 'Lunchpail,' hosted by Paul Gorman, on October 30, 1973, at approximately 2:00 p.m." The licensee stated that "the monologue in question was

from the album 'George Carlin, Occupation: FOOLE,' Little David Records"; that on October 30 the "Lunch-pail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

> The section from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.
>
> His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language or ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.
>
> As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.

In response to the Commission's request for a recording or script of the program, the licensee, by letter dated April 3, 1974, stated that no recording of the program was made, "and since the program was done live and extemporaneously, no script was prepared in advance."

DISCUSSION

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of Justice and the FCC are obliged to enforce section 1464.[3] This declaratory order is not intended to modify our previous decisions recognizing broadcasters' broad discretion in the

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[3] Thus Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

programming area. For example, in *Pacifica Foundation*, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. Pacifica had, however, taken "into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum)." 36 FCC at 149. See also *Anti-Defamation League*, 4 FCC 2d 190, affirmed 131 U.S. App. D.C. 146, 403 F. 2d 169 *cert. denied* 394 U.S. 930 (1969).

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). As we noted in *WUHY-FM*, *supra*:

> . . . broadcasting is disseminated to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact that by its very nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. 24 FCC 2d at 411. (Footnotes omitted).

The intrusive nature of broadcasting was also recognized in *Sonderling Broadcasting*:

> [Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in the electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater. 27 RR 2d at 288.

See also, *Illinois Citizens*, *supra*, Slip. Op. 11, 15.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in *Burstyn* v. *Wilson*, 343 U.S. 495, 502-503 (1952), "each method [or expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California*, 413 U.S. at 18-19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.[4]

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[4] "Possible negative effects on children are concerns unto themselves . . . So long as broadcasting is so all pervasive and can get into those homes where parental guidance is non-existent, it should take advantage of its opportunities. It should not shift its responsibilities. . . ." Quaal & Martin, *Broadcast Management* 57-60 (1968).

10. There is authority for the proposition that the term "indecent" in Section 1464 is *not* subsumed by the concept of obscenity—that the two terms refer to two different things. See *United States* v. *Smith*, 467 F. 2d 1126 (7th Cir. 1972); *Tallman* v. *United States*, 465 F. 2d 282 (7th Cir. 1972); *Gagliardo* v. *United States*, 366 F. 2d 720 (9th Cir. 1966). But the term "indecent" has never been authoritatively construed by the Courts in connection with Section 1464. The Commission did offer a definition in *WUHY-FM*, *supra*, but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (*Miller and Illinois Citizens*, *supra*), we are reformulating the concept of "indecent."

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. *Williams* v. *District of Columbia*, 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter* v. *United States*, 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder*, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the

broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[5] Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM*, 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.[6]

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller* v. *California*, *supra*.

13. We recognize that *Cohen* v. *California*, 403 U.S. 16 (1971) held that an individual could not be punished

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[5] Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and *carefully schedules for late night broadcasts* those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (emphasis added) 36 FCC at 149, n. 3. See also *WUHY-FM* 24 FCC 2d at 411.

[6] There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in *Cohen* that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. *Cf. Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970).

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY-FM* and *Sonderling*. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 USC 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901

(1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F.2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely would's say, ever, cause I

heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we notice was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word —the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word. 50% dirty —dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, her (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of

the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a

shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains. (laughter) shit-face, heh (laughter) I always try to think how that could have originated: the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuc*k* (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and

yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that

pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight and thank you also. (clapping, whistling)"

Concurrent Statement of Commissioner Charlotte T. Reid

Today, the Commission takes what I feel to be an important and altogether necessary step in clarifying our position on the broadcasting of indecent language over the public's air waves. I therefore concur with the action of the Commission.

This practice, though engaged in by only a few careless broadcasters, has been a constant source of irritation over the past several years. Now, the formulation of the standards set forth in our Declaratory Order should serve as a signal to those few offending broadcasters that the Commission is fully cognizant of our public interest responsibilities in this sensitive area. I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrent practice continue.

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.

Concurring Statement of Commissioner Quello

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I have serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an up-dated standard in light of the Supreme Court's ruling in *Miller* v. *California*, 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 ". . . are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

I would emphasize that I am not here espousing a prudish critique of the use of words of this nature. I do criticize the broadcast of such words so that they may intrude into the privacy of the home via the unsuspecting listener's radio set.

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political, or scientific value. They will note that the audience is composed of a minimum of children, and their preprogram *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of

such programming on the merits under the standard adopted today.

I must reiterate that I have concurred in the adoption of the new standard on broadcasting of indecent language only for the reason that there must be a line drawn somewhere as to what this Commission will permit to be broadcast. Recognizing the pitfalls inherent in the approach we have taken, I concur in the decision—with trepidation.

Concurring Statement of Commissioner Glen O. Robinson in Which Commissioner Benjamin L. Hooks Joins

On reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public . . . airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of noninterference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further reflection, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government non-intervention permits some accommodation to the demands of decency. I think it must be emphasized, however, just how limited is the scope of that accommodation. Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid "indecent" language over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of governmental restraint in matters of public decorum. Today's decision accordingly gives a narrow meaning to the term "indecent," tying the definition essentially to that which is deemed inappropriate for children without parental supervision. I concur in that determination (subject to some reservations) for reasons which call for elaboration.

I. CONSTITUTIONAL BACKGROUND

The majority's opinion ably examines most of the pertinent constitutional precedent, but it does not offer all of the background which I think is helpful in placing this decision in the larger context of constitutional jurisprudence. For the moment we may fudge the distinction, if any, between the "obscene" and the "indecent." There is no significant jurisprudence explaining the meaning of the latter term. However, the difficulties that have arisen in connection with obscenity regulation fairly display the problems one runs into where laws seek to control matters that go to the injury of intangibles, like people's sensibilities, rather than palpable damage.[1]

For obscenity regulation, modern times begin with *Roth* v. *United States*, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In *Roth*, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). What Lockhart

[1] Where the gist of the offense is more "sin" than "crime" *see* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

and McClure call "the core problem"—what constitutes obscenity—has never been satisfactorily unraveled.[2]

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class of books and magazines which could be suppressed by government power. In *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962), the Court, reviewing the Post Office's seizure of a number of magazines which featured pictures of naked men, was asked to consider whether the "prurient interest" part of the *Roth* test referred to the prurient interest of the special audience at whom the magazines were targeted (homosexuals), or that of an average member of the community. Instead of answering that question, the Court asked another: observing that these pictures "could not be deemed so offensive on their face as to affront current community standards of decency," and assuming, arguendo, that pictures of naked men do arouse the prurient interest of certain parts of the population, could Congress have intended the incitement of prurience, *simpliciter*, to be a crime? Said Mr. Justice Harlan for the Court: ". . . one would not have to travel far even among the acknowledged masterpieces [in literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose. . . ." Since *Manual Enterprises*, the idea of "patent offensiveness" has always been a part of the definition of obscenity. In *A Book Named John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex, whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the

[2] Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?* 7 Utah L. Rev. 289 (1961).

Supreme Court held that unless such a work was "utterly without redeeming social value," it could not be held obscene. *Miller* v. *California*, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value." [3] 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. Mr. Justice Black, dissenting in *Breard* v. *City of Alexandria*, 341 U.S. 662 (1951), observed that "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate." How far that corollary of free speech extends has never been clear, and is not clear now. In *Martin* v. *City of Struthers*, 319 U.S. 411, an ordinance forbidding anyone from ringing a doorbell to deliver a handbill was struck down in the instance of a religious handbill. A city ordinance forbidding the use of sound trucks except to disseminate items of public concern was struck down in *Saia* v. *New York*, 334 U.S. 558 (1948).[4] In *Edwards*

[3] *Miller* also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the *local*, not national, community. See 413 U.S. at 31-33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

[4] *Cf. Kovacs* v. *Cooper*, 336 U.S. 77 (1949), where the Court upheld an ordinance that banned the use of sound trucks outright. In his concurring opinion, Judge Frankfurter opined that *Kovacs* and *Saia* were irreconcilable. But he was mistaken. Taken together, the two cases say that where sound trucks are allowed at all, their reasonable use as a medium of communication may be a constitutional right.

v. *South Carolina*, 372 U.S. 229 (1963), the State's attempt to punish a number of noisy but peaceable demonstrators was held unlawful.[5] In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the Court threw out an anti-blockbusting injunction, saying: ". . . so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419. In *Cohen* v. *California*, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.[6]

II. POLICY CONSIDERATIONS

As the Commission's opinion recognizes, this is essentially a case of first impression. Although *Eastern Edu-*

[5] *Compare Adderly* v. *Florida*, 385 U.S. 39 (1966).

[6] It is vital that it be recognized that the public use of certain words relating to sex and excretion are taboo, in the sense given to that term by Freud: "Taboo is a Polynesian word . . . [which] means uncanny, dangerous, forbidden and unclean. The opposite word for taboo is designated in Polynesian by the word *noa* and signifies something ordinary and generally accessible. Thus, something like the concept of reserve inheres in taboo; taboo expresses itself essentially in prohibitions and restrictions. Our combination of 'holy dred' would often express the meaning of taboo.

"The taboo restrictions are often different from religious or moral prohibitions. They are not traced to the commandment of a god but really they themselves impose their own prohibitions; they are differentiated from moral prohibitioins by failing to be included in a system which declares abstinences in general to be necessary and gives reasons for this necessity. The taboo prohibitions lack all justification and are of unknown origin." S. Freud, *Totem and Taboo*, 31, 32 (A. Brill trans. 1918).

cational Radio (WUHY-FM), 24 FCC2d 408 (1970) did rest squarely on a finding that certain coarse language uttered in an interview was indecent under 18 USC 1464, circumstances have changed since that case was decided. In the first place, our definition of "indecent" in *WUHY* tracked the *Roth-Memoirs* definition of obscenity then in force; since that time, *Miller* v. *California* and its companion cases redefined obscenity; and obviously it is now necessary for us to consider whether and in what way the definition of indecency should also be changed. In the second place, the Court of Appeals in *Illinios Citizens Broadcasting* v. *FCC*, —— F.2d —— (D.C. Cir. 1974) reserved the definition of "indecency" with a studied explicitness (Slip Op. at p. 10, n. 14) that commands the conclusion that the legal meaning of the term is still very much an open question. It is against this background that the Commission must act.

Although indecent broadcast material is clearly prohibited by 18 USC 1464, as the Commission recognizes, the Supreme Court's recent decision in *United States* v. *Twelve 200-Foot Reels of Film*, 413 U.S. 123, 130, n. 7 (1973) sheds doubt on whether the term indecent can be given a meaning independent of the meaning of "obscene." The Court there spoke to 19 USC 1305(a) and 18 USC 1462, which prohibits the interstate transportation of "indecent," "lewd," "lascivious," "filthy," or "immoral" materials. The Court held that if it were necessary to do so in order to avoid problems of unconstitutional vagueness and overbreadth, these terms would be limited to patently offensive representations or descriptions of specific "hard-core" sexual conduct of a type deemed to be obscene in the *Miller* decision. But 18 USC 1464, which deals with radio communications, is distinguishable from the provisions of the Code dealing with transportation which the Court construed in *Twelve 200-Foot Reels*. Maybe it is a distinction without a difference but I think our duty requires us generally

to assume the constitutionality of the statute if we can find a rational basis for doing so.

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put;[7] the fact that these media enter the privacy of the home[8] are two prominent differences. I could not say that these differences *compel*, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broad-

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[7] Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) with *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974). I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Commission relied on, in part, in *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. See *Red Lion, supra*, 395 U.S. at 389. See generally, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

[8] See *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

cast media—but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond *Sonderling*, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here. I do not think that the case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecency." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecency" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

III. THE PUBLIC INTEREST IN POLICING DECENCY

None of us supposes that invoking the nuisance concept is a talisman with which we can waive off all difficulties in approaching the task of controlling such speech. The reference to nuisance is meant to be more atmospheric than substantive. The governing idea is that "indecency" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.[9]

[9] I initially had some difficulty with the idea that "literary, artistic, political or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea—that is, that "indecent" is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappropriate circumstances. Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

On the issue of artistic value as a defense, one further point should be mentioned. Pacifica's comparison of Carlin with Mark Twain strikes me personally as being a bit jejuene. But no one should suppose that an author must be a giant of letters in order to receive protection for works which have "serious literary [or] artistic . . . value." The Constitution protects lesser literary lights as well as those with the artistic candlepower of Mark Twain. If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.

Compare, *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

I acknowledge that the logic of this "nuisance" test of obscenity or indecency could carry us much further into the realm of censorship than would be proper. But I also think that the attempt to accommodate the powerful sensibilities that attach to free speech on the one hand, and modesty on the other, is worth the effort. I do not think either interest deserves to be slighted. Yet, in the nature of things, it is easy to get carried away by the momentum of a single principle on either side of the dispute, and to fail to appreciate the validity of the impulses that are inconsistent with it. Some students of government regulation of decency have gone quite far in constructing a broad rationale for government intervention not merely as a means of curbing a "nuisance" in the narrow sense of that term, but more broadly as a means of maintaining some kind of general standard of quality in public manners. Irving Kristol, for example, has recently attempted to construct a case for "liberal censorship" along such lines:

> [N]o society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering of animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether . . . they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident—one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture.

Kristol, *The Case for Liberal Censorship*, in *Where Do You Draw the Line?* 47 (1974). Kristol's argument for "liberal censorship" is similar to the provocative argument of James Fitzjames Stephen a century ago, and of Lord Devlin, in our own time, defending the role of the State in enforcing moral behavior. J. Stephen, *Liberty, Equality, Fraternity* (2d Ed. 1874); P. Devlin, *The Enforcement of Morals* (1968). This is hardly the occasion to examine the pros and cons of the Stephen-Devlin-Kristol thesis.[10] But it is the occasion to state that the legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.[11] And it is an activity that I could not countenance this Commission engaging in. Neither the Communications Act nor 18 USC 1464 invests the FCC with a general power to establish canons of acceptable decency or good taste in

[10] The classic case against the thesis is, of course, John Stuart Mill's, *On Liberty* (1859), the target of Stephen's (and to a lesser degree Devlin's) attack. For a concise but penetrating modern defense of Mill and a critique of Stephen's and Devlin's arguments, see H.L.A. Hart, *Law, Liberty and Morality* (1963).

[11] Which is not to deny that moral considerations may align with and provide some support for laws whose aim is utilitarian protection of individuals or society, a point well developed by Hart, *supra*.

programming. We cannot make the claim that Lord Mansfield made for his tribunal:

> Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.

Jones v. *Randall* (1774), quoted in Hart, *supra*, p. 7. However the matter stood in 18th century England—or indeed 20th century England[12]—I trust no one doubts that things are different in the United States today.

Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hard-bitten libertarians do not find entirely uncongenial.[13] Even here there is obviously need for cau-

[12] Mansfield's dictum has taken on new life as a result of the House of Lords' decision in *Shaw* v. *Director of Public Prosecutions*, 2 All Eng. Rep. 446 (1961). The opinion of Lord Simonds is particularly noteworthy in this respect: "When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offenses *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power. where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society."

[13] Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, *Ibid*. I hope we do not qualify for that exception.

tion, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

IV. CONCLUSION

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to coexist by *tour de force*. This agency, in my view, has the power to compel that coexistence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

APPENDIX C

F.C.C. 76-271

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF A "PETITION FOR CLARIFICATION OR RECONSIDERATION" OF A CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION, STATION WBAI(FM), NEW YORK, N.Y.

MEMORANDUM OPINION AND ORDER

(Adopted: March 19, 1976; Released: March 23, 1976)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has under consideration a "Petition for Clarification or Reconsideration" of its declaratory order in the matter of *Pacifica Foundation*, 56 FCC 2d 94 (1975), filed by the Radio Television News Directors Association (RTNDA). In its order the Commission clarified the standard it employs to determine whether and under what circumstances language depicting sexual and excretory activities and organs is indecent. The Commission concluded that its action was required to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), and to enforce the indecency provision of 18 U.S.C. § 1464.

2. The declaratory order was occasioned by a complaint concerning language broadcast by station WBAI (FM), New York, New York. The Commission stated that its primary concern was the protection of children from language which most parents consider inappropriate for them to hear:

> . . . the concept of "indecent" is intimately connected with the exposure of children to language that de-

> scribes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 56 FCC 2d at 98.

Thus, the Commission never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it. The Commission emphasized that it did not intend to "stifle robust, free debate on any of the controversial issues confronting our society" nor to "force upon the general listening public debates and ideas which are 'only fit for children.'" 56 FCC 2d at 99. It further noted that the real solution to this problem was the "exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 56 FCC 2d at 100.

3. RTNDA now seeks a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program." Citing as an example "audio and video 'actualities' of angry political demonstrations and even more structured political debate, interviews and conversations . . .", RTNDA states that the order will cause licensees to censor programming and this would "not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason . . . . , regularly and publicly use language which a majority of the public considers to be indecent. . . ." Accordingly, RTNDA asserts that the Commission probably did not intend that its standard be applied in such situations, and requests appropriate clarification. Alternatively, if the Commission did intend such an application, it asks that we reconsider.

4. We note that our declaratory order was issued in a specific factual context. We share petitioner's concern that we must take no action which would inhibit broadcast journalism.[1] However, we differ with RTNDA's view that our order will have such an effect. By our order we sought primarily to protect young children from sexually explicit language. See *Illinois Citizens Committee* v. *FCC*, 515 F.2d 397 (1975). We intimated that such language could be broadcast—in a news or public affairs program or otherwise—when the number of children in the audience was reduced to a minimum, if sufficient warnings were given to unconsenting adults and if in the context used the language had serious literary, artistic, political or scientific value. Having said this, we will not comment on the various hypothetical situations posed by RTNDA.

5. Our disinclination to discuss this subject further in the absence of a concrete factual context is in accord with our long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them. *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973); see also Bickel, *The Unpublished Opinions of Mr. Justice Brandeis*, pp. 2-3 (1957).

---

[1] Footnote 5 of RTNDA's Petition calls to our attention the fact that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. *Cf. NBC* v. *FCC*, 516 F.2d 1101, 1153 (1974); Tamm, J. dissenting. We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes.

6. In view of the foregoing IT IS ORDERED, That RTNDA's "Petition for Clarification or Reconsideration" is GRANTED to the extent indicated in footnote 1 and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1976

No. 75-1391

[Filed March 16, 1977, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

PACIFICIA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: BAZELON, Chief Judge, TAMM and LEVENTHAL, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Communications Commission under

review is hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 16, 1977

Opinion filed by Circuit Judge Tamm
Concurring opinion filed by Chief Judge Bazelon
Dissenting opinion filed by Circuit Judge Leventhal

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

PACIFICIA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

Upon consideration of the suggestion for rehearing *en banc* of respondents Federal Communications Commission and United States of America, and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:
GEORGE A. FISHER
Clerk

Circuit Judges Leventhal, MacKinnon, Robb and Wilkey would grant respondents' suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

PACIFICIA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

BEFORE: Bazelon, Chief Judge; Tamm and Leventhal, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by respondents Federal Communications Commission and United States of America, it is

ORDERED by the Court that respondents' aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Leventhal would grant respondents' petition for rehearing.

APPENDIX F

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

§ 151. Purposes of Act; Creation of Federal Communications Commission.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

§ 303. General Powers Of The Commission

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

§ 312. Administrative Sanctions

(a) The Commission may revoke any station license or construction permit—

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

§ 312.

(b) Where any person . . .

(2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code . . . the Commission may order such person to cease and desist from such action.

§ 326. Censorship; Indecent Language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

§ 503. Penal Provisions—Forfeitures
General Penalty

(b) (1) Any licensee or permittee of a broadcast station who—

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 246275 64

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1977
CERTIORARI GRANTED JANUARY 9, 1978

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I

Relevant Docket Entries in the United States Court of Appeals (D.C. Cir.) in PACIFICA FOUNDATION *v.* FCC AND USA

No. 75–1391

Date	Filings-Proceedings
1975	
Apr. 18	Petition to Review, FCC Memorandum Opinion and Order, FCC 75-200.
Apr. 30	FCC certified list of items in the record.
1977	
Mar. 16	Judgment of Court of Appeals. Opinion filed by Circuit Judge Tamm. Concurring opinion filed by Chief Judge Bazelon. Dissenting opinion filed by Circuit Judge Leventhal.
Apr. 15	Petition for Rehearing and Suggestion for Rehearing *En Banc*.
May 10	Orders of United States Court of Appeals for the District of Columbia Circuit denying Petition for Rehearing and Suggestion for Rehearing *En Banc*. Circuit Judges Leventhal, MacKinnon, Robb and Wilkey would grant suggestion for Rehearing *en banc*.

II

Relevant Pleadings Before and Orders of the Federal Communications Commission in Citizen's Complaint against Pacifica Foundation, Station WBAI (FM), New York, N.Y.

[Received by FCC Mail Branch on Dec. 3, 1973]

JOHN H. DOUGLAS,
385 MADISON AVENUE,
New York, N.Y. 10017, November 28, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554

GENTLEMEN: On October 30th, in the early afternoon (from approximately 1:30 p.m. to 2:30 p.m.), while driving in my car, I tuned to radio station WBAI in New York City.

I heard, among other obscenities, the following words:

cocksucker	fuck
cunt	shit

and a whole host of others. This was supposed to be part of a comedy monologue.

Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control. Any child could have been turning the dial, and tuned in to that garbage.

Some time back, I read that "topless" radio stations were fined for suggestive phrases. If you fine for suggestions, should not this station lose its license entirely for such blatant disregard for the public ownership of the airwaves?

Can you say this is a responsible radio station, that demonstrates a responsibility to the public for its license?

I'd like to know, gentlemen, just what *you're* going to do about this outrage, and, by copy, I'm asking our elected officials the same thing.

Incidentally, my young son was with me when I heard the above, and, unfortunately, he can corroborate what was heard.

Yours truly,

cc: Senator James Buckley; Senator John Pastore; Morality in Media

MR. JOHN H. DOUGLAS.

[Received Jan. 8, 1974]

PACIFICA WBAI FM 99.5,
359 EAST 62ND STREET,
New York City 10021, January 7, 1974.

WILLIAM B. RAY,
Chief, Complaints and Compliance Division, Broadcast Bureau, Room 332, Federal Communications Commission, Washington, D.C. 20554

Re: 8310-m; C12-47

DEAR MR. RAY: I am writing on behalf of Pacifica Foundation, licensee of non-commercial educational Station WBAI-FM, New York, in response to the above-referenced letter from your office dated December 10, 1973 forwarding a letter of complaint from Mr. John H. Douglas.

Mr. Douglas' complaint is based upon the language used in a satirical monologue broadcast during the course of a regularly scheduled live program "Lunchpail," hosted by Paul Gorman, on October 30, 1973 at approximately 2:00 p.m. The monologue in question was from the album "George Carlin, Occupation: FOOLE," Little David Records, distributed by Atlantic Recording Corporation. On October 30, the "Lunchpail" program consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language. The subject was also discussed with listeners who called-in. Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.

The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the

broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

If you have any further questions regarding this matter, please contact Pacifica Foundation's Washington communications counsel, David Tillotson, Esquire, Arent, Fox, Kintner, Plotkin & Kahn, 1200 Federal Bar Building, 1815 H Street NW, Washington, D.C. 20006.

Sincerely,

EDWIN A. GOODMAN,
President, Pacifica Foundation.

HENRY S. HEIFETZ,
Program Director, Station WBAI.

CC: David Tillotson

Re: 8310-M C1-379

APRIL 3, 1974.

Mr. WILLIAM B. RAY,
Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission, Washington, D.C. 20554

DEAR MR. RAY: I am writing to you on behalf of Pacifica Foundation, licensee of non-commercial, educational station WBAI, New York, N.Y., in response to the above-referenced letter from your office dated March 26, 1974 which requested a tape of the program, "Lunchpail," broadcast over WBAI-FM on October 30, 1974.

We regret to inform you that no recording of this program was made; and since the program was done live and extemporaneously, no script was prepared in advance.

If you have any further questions with respect to this matter, please contact Pacifica's Washington Communications counsel, David F. Tillotson, Esq., of the firm, Arent, Fox, Kintner, Plotkin, and Kahn; 1815 H Street NW., Washington, D.C. 20006.

Sincerely,

LARRY JOSEPHSON,
General Manager.

EDWIN A. GOODMAN,
President, Pacifica Foundation.

FCC 75-200

Before the Federal Communications Commission

Washington, D.C. 20554

File No. BRH-13

IN THE MATTER OF A CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION STATION WBAI (FM), NEW YORK, N.Y.

Declaratory Order

MEMORANDUM OPINION AND ORDER

(Adopted February 12, 1975; Released February 21, 1975)

By the Commission: Chairman *Wiley* concurring in the result; Commissioners *Reid and Quello* concurring and issuing statements; Commissioner *Robinson* concurring and issuing a statement in which Commissioner *Hooks* joins.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in *Eastern Educational Radio* (WUHY-FM), 24 FCC 2d 408 (1970) and issued a notice of apparent liability which held

"indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.[1]

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in *Miller* v. *California,* 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in *WUHY*. Further, *Sonderling Corp.,* 27 RR 2d 285, *recon. denied* 41 FCC 2d 777 (1973) was affirmed sub. nom. *Illinois Citizens Committee for Broadcasting, et al.* v. *FCC,* D.C. Cir. No. 73-1652, decided November 20, 1974, and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.[2] In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in

---

[1] The Commission is empowered to impose sanctions on licensees who violate § 1464 of Title 18 of the United States Code which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C.A. 1464.

[2] The Court upheld the Commission's finding of obscenity against a radio call-in show which, during hours when the audience could include children, had broadcast explicit discussions of ultimate sexual acts in a titillating context. Accordingly, it did not have to "reach the question of the constitutionality of [the Commission's] interpretation and application of term 'incident.'" [Sic.] Slip Op. 10, n. 5. The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value, 24 FCC 2d at 412.

considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene" language which was discussed by the Commission in *Sonderling Corp., supra.*

THE COMPLAINT

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck," "cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue," that "Any child could have been turning the dial, and tuned in to that garbage," and that "Incidentally, my young son was with me when I heard the above * * *"

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on October 30, 1973, states that it was recorded live at the Circle Star Theatre, San Carlos, California. The segment of the record to which the complainant obviously referred was Cut 5 of Side 2, titled "Filthy Words" and ran 11 minutes and 45 seconds. A verbatim transcript of this material is attached hereto as an Appendix and is incorporated herein by reference.

5. Review of this recorded monologue reveals that it consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public * * * airways * * * the ones you definitely couldn't say * * *" Thereafter there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

PACIFICA'S RESPONSE

6. On December 10, 1973, the complaint was forwarded to WBAI (FM) with a request for its comments. After receipt of the licensee's initial response, dated January 7, 1974, the Commission, on March 26, 1974, requested that it forward a recording or complete script of the program in question. In response, the licensee stated that the complaint was based on the language used "in a satirical monologue broadcast during the course of a regularly scheduled live program, 'Lunchpail,' hosted by Paul Gorman, on October 30, 1973, at approximately 2:00 p.m." The licensee stated that "the monologue in question was from the album 'George Carlin, Occupation: FOOLE,' Little David Records"; that on October 30 the "Lunchpail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue,

listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

In response to the Commission's request for a recording or script of the program, the license, by letter dated April 3, 1974, stated that no recording of the program was made, "and since the program was done live and extemporaneously, no script was prepared in advance."

DISCUSSION

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of Justice and the FCC are obliged to enforce section 1464.[3] This declaratory order is not intended to modify our previous decisions recognizing broadcasters' broad discretion in the programming area. For example, in *Pacifica Foundation*, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. Pacifica had, however, taken "into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum)." 36 FCC at 149. See also *Anti-Defama-*

[3] Thus Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

tion League, 4 FCC 2d 190, affirmed 131 U.S. App. D.C. 146, 403 F. 2d 169 *cert. denied* 394 U.S. 930 (1969).

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). As we noted in *WUHY–FM, supra:*

> * * * broadcasting is disseminated to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. 24 FCC 2d at 411. (Footnotes omitted).

The intrusive nature of broadcasting was also recognized in *Sonderling Broadcasting:*

> [Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of

> radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater. 27 RR 2d at 288.

See also, *Illinois Citizens, supra,* Slip. Op. 11, 15.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in *Burstyn* v. *Wilson,* 343 U.S. 495, 502–503 (1952), "each method [of expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California,* 413 U.S. at 18–19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.[4]

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[4] "Possible negative effects on children are concerns unto themselves * * * So long as broadcasting is so all pervasive and can get into those homes where parental guidance is non-existent, it should take advantage of its opportunities. It should not shift its responsibilities * * * ." Quaal & Martin, *Broadcast Management* 57–60 (1968).

10. There is authority for the proposition that the term "indecent" in Section 1464 is *not* subsumed by the concept of obscenity—that the two terms refer to two different things. See *United States* v. *Smith,* 467 F. 2d 1126 (7th Cir. 1972); *Tallman* v. *United States,* 465 F. 2d 282 (7th Cir. 1972); *Gagliardo* v. *United States,* 366 F. 2d 720 (9th Cir. 1966). But the term "indecent" has never been authoritatively construed by the Courts in connection with Section 1464. The Commission did offer a definition of *WUHY-FM, supra,* but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (*Miller* and *Illinois Citizens, supra*), we are reformulating the concept of "indecent."

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance, *Williams* v. *District of Columbia,* 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter* v. *United States,* 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder,* 406 U.S. 206, 214 (1972), and cases cited therein.

Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[5] Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM,* 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.[6]

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably

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[5] Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and *carefully schedules for late night broadcasts* those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (emphasis added) 36 FCC at 149, n. 3. See also *WUHY-FM*, 24 FCC 2d at 411.

[6] There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

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be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller* v. *California, supra.*

13. We recognize that *Cohen* v. *California,* 403 U.S. 16 (1971) held that an individual could not be punished for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in *Cohen* that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. *Cf. Rowan* v. *Post Office Dept.,* 397 U.S. 728, 738 (1970).

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently

offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI–FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY–FM* and *Sonderling.* A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 USC 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F. 2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation,

licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker,

motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (la ghter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got

the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, some-

times, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, were going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on

the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass.* (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)"

Concurring Statement of Commissioner Charlotte T. Reid

Today, the Commission takes what I feel to be an important and altogether necessary step in clarifying our position on the broadcasting of indecent language over the public's air waves. I therefore concur with the action of the Commission.

This practice, though engaged in by only a few careless broadcasters, has been a constant source of

irritation over the past several years. Now, the formulation of the standards set forth in our Declaratory Order should serve as a signal to those few offending broadcasters that the Commission is fully cognizant of our public interest responsibilities in this sensitive area. I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrent practice continue.

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.

Concurring Statement of Commissioner Quello

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I nave serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an up-dated standard in light of the Supreme Court's ruling in *Miller* v. *California,* 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 "* * * are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is

garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

I would emphasize that I am not here espousing a prudish critique of the use of words of this nature. I do criticize the broadcast of such words so that they may intrude into the privacy of the home via the unsuspecting listener's radio set.

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political, or scientific value. They will note that the audience is composed of a minimum of children, and their pre-program *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

I must reiterate that I have concurred in the adoption of the new standard on broadcasting of indecent language only for the reason that there must be a line drawn somewhere as to what this Commission will permit to be broadcast. Recognizing the pitfalls inherent in the approach we have taken, I concur in the decision—with trepidation.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON IN WHICH COMMISSIONER BENJAMIN L. HOOKS JOINS

On reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public * * * airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of noninterference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further refletion, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government nonintervention permits some accommodation to the demands of decency. I think it must be emphasized, however, just how limited is the scope of that accommodation. Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid "indecent" languages over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of governmental restraint in matters of public decorum. Today's decision accordingly gives a narrow meaning to the term "indecent," tying the definition essentially to that which is deemed inappropriate for children without parental supervision. I concur in that determination (subject to some reservations) for reasons which call for elaboration.

I. CONSTITUTIONAL BACKGROUND

The majority's opinion ably examines most of the pertinent constitutional precedent, but it does not offer all of the background which I think is helpful in placing this decision in the larger context of constitutional jurisprudence. For the moment we may fudge the distinction, if any, between the "obscene" and the "indecent." There is no significant jurisprudence explaining the meaning of the latter term. However, the difficulties that have arisen in connec-

tion with obscenity regulation fairly display the problems one runs into where laws seek to control matters that go to the injury of intangibles, like people's sensibilities, rather than palpable damage.[1]

For obscenity regulation, modern times begin with *Roth* v. *United States*, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In *Roth*, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). What Lockhart and McClure call "the core problem"—what constitutes obscenity—has never been satisfactorily unraveled.[2]

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class

[1] Where the gist of the offense is more "sin" than "crime" *see* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

[2] Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 Utah L. Rev. 289 (1961).

of books and magazines which could be suppressed by government power. In *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962), the Court, reviewing the Post Office's seizure of a number of magazines which featured pictures of naked men, was asked to consider whether the "prurient interest" part of the *Roth* test referred to the prurient interest of the special audience at whom the magazines were targeted (homosexuals), or that of an average member of the community. Instead of answering that question, the Court asked another: observing that these pictures "could not be deemed so offensive on their face as to affront current community standards of decency," and assuming, arguendo, that pictures of naked men do arouse the prurient interest of certain parts of the population, could Congress have intended the incitement of prurience, *simpliciter*, to be a crime? Said Mr. Justice Harlan for the Court: "* * * one would not have to travel far even among the acknowledged masterpieces [in literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose. * * *" Since *Manual Enterprises*, the idea of "patent offensiveness" has always been a part of the definition of obscenity. In *A Book Named John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex, whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the Supreme Court held that unless such a work was

"utterly without redeeming social value," it could not be held obscene. *Miller* v. *California*, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value."[3] 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. Mr. Justice Black, dissenting in *Breard* v. *City of Alexandria*, 341 U.S. 662 (1951), observed that "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate." How far that corollary of free speech extends has never been clear, and is not clear now. In *Martin* v. *City of Struthers*, 319 U.S. 141, an ordinance forbidding anyone from ringing a doorbell to deliver a handbill was struck down in the instance of a religious handbill. A city ordinance forbidding the use of sound trucks except to disseminate items of public concern was struck down in *Saia* v.

[3] *Miller* also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the *local*, not national, community. See 413 U.S. at 31–33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

New York, 334 U.S. 558 (1948).[4] In *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the State's attempt to punish a number of noisy but peaceable demonstrators was held unlawful.[5] In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the Court threw out an anti-blockbusting injunction, saying: "* * * so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419. In *Cohen* v. *California*, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.[6]

[4] *Cf. Kovacs* v. *Cooper*, 336 U.S. 77 (1949), where the Court upheld an ordinance that banned the use of sound trucks outright. In his concurring opinion, Justice Frankfurter opined that *Kovacs* and *Saia* were irreconcilable. But he was mistaken. Taken together, the two cases say that where sound trucks are allowed at all, their reasonable use as a medium of communication may be a constitutional right.

[5] Compare *Adderly* v. *Florida*, 385 U.S. 39 (1966).

[6] It is vital that it be recognized that the public use of certain words relating to sex and excretion are taboo, in the sense given to that term by Freud: "Taboo is a Polynesian word * * * [which] means uncanny, dangerous, forbidden and unclean. The opposite word for taboo is designated in Polynesian by the word *noa* and signifies something ordinary and generally accessible. Thus, some-

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II. POLICY CONSIDERATIONS

As the Commission's opinion recognizes, this is essentially a case of first impression. Although *Eastern Educational Radio* (*WUHY-FM*), 24 FCC 2d 408 (1970) did rest squarely on a finding that certain coarse language uttered in an interview was indecent under 18 USC 1464, circumstances have changed since that case was decided. In the first place, our definition of "indecent" in *WUHY* tracked the *Roth-Memoirs* definition of obscenity then in force; since that time, *Miller* v. *California* and its companion cases redefined obscenity; and obviously it is now necessary for us to consider whether and in what way the definition of indecency should also be changed. In the second place, the Court of Appeals in *Illinois Citizens Broadcasting* v. *FCC*, —— F. 2d —— (D.C. Cir. 1974) reserved the definition of "indecency" with a studied explicitness (Slip Op. at p. 10, n. 14) that commands the conclusion that the legal meaning of the term is still very much an open question. It is against this background that the Commission must act.

Although indecent broadcast material is clearly prohibited by 18 USC 1464, as the Commission recognizes, the Supreme Court's recent decision in *United*

(Continued)

thing like the concept of reserve inheres in taboo; taboo expresses itself essentially in prohibitions and restrictions. Our combination of 'holy dred' would often express the meaning of taboo.

"The taboo restrictions are often different from religious or moral prohibitions. They are not traced to the commandment of a god but really they themselves impose their own prohibitions; they are differentiated from moral prohibitions by failing to be included in a system which declares abstinences in general to be necessary and gives reasons for this necessary. The taboo prohibitions lack all justification and are of unknown origin." S. Freud, *Totem and Taboo*, 31, 32 (A. Brill trans. 1918).

States v. *Twelve 200-Foot Reels of Film*, 413 U.S. 123, 130, n. 7 (1973) sheds doubt on whether the term indecent can be given a meaning independent of the meaning of "obscene." The Court there spoke to 19 USC 1305(a) and 18 USC 1462, which prohibits the interstate transportation of "indecent," "lewd," "lascivious," "filthy," or "immoral" materials. The Court held that if it were necessary to do so in order to avoid problems of unconstitutional vagueness and overbreadth, these terms would be limited to patently offensive representations or descriptions of specific "hard-core" sexual conduct of a type deemed to be obscene in the *Miller* decision. But 18 USC 1464, which deals with radio communications, is distinguishable from the provisions of the Code dealing with transportation which the Court construed in *Twelve 200-Foot Reels*. Maybe it is a distinction without a difference but I think our duty requires us generally to assume the constitutionality of the statute if we can find a rational basis for doing so.

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put;[7] the fact

[7] Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, (1969) with *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974). I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Com-

that these media enter the privacy of the home[8] are two prominent differences. I could not say that these differences *compel*, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broadcast media—but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond *Sonderling*, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here, I do not think that the

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mission relied on, in part, in *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. See *Red Lion*, *supra*, 395 U.S. at 389. See generally, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

[8] See *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecency." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecency" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

III. THE PUBLIC INTEREST IN POLICING DECENCY

None of us supposes that invoking the nuisance concept is a talisman with which we can waive off all difficulties in approaching the task of controlling such speech. The reference to nuisance is meant to be more atmospheric than substantive. The governing idea is that 'indecency" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.[9] Compare, *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

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[9] I initially had some difficulty with the idea that "literary, artistic, political or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea—that is, that "indecent" is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappro-

I acknowledge that the logic of this "nuisance" test of obscenity or indecency could carry us much further into the realm of censorship than would be proper. But I also think that the attempt to accommodate the powerful sensibilities that attach to free speech on the one hand, and modesty on the other, is worth the effort. I do not think either interest deserves to be slighted. Yet, in the nature of things, it is easy to get carried away by the momentum of a single principle on either side of the dispute, and to fail to appreciate the validity of the impulses that are inconsistent with it. Some students of government regulation of decency have gone quite far in constructing a broad rationale for government intervention not merely as a means of curbing a "nuisance" in the narrow sense of that term, but more broadly as a means of maintaining some kind of general standard of quality in public manners. Irving Kristol, for example, has recently attempted to construct a case for "liberal censorship" along such lines:

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priate circumstances. Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

On the issue of artistic value as a defense, one further point should be mentioned. Pacifica's comparison of Carlin with Mark Twain strikes me personally as being a bit jejuene. But no one should suppose that an author must be a giant of letters in order to receive protection for works which have "serious literary [or] artistic * * * value." The Constitution protects lesser literary lights as well as those with the artistic candlepower of Mark Twain. If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.

> [N]o society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering of animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether * * * they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident—one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture.

Kristol, *The Case for Liberal Censorship,* in *Where Do You Draw the Line?* 47 (1974). Kristol's argument for "liberal censorship" is similar to the provocative argument of James Fitzjames Stephen a century ago, and of Lord Devlin, in our own time, defending the role of the State in enforcing moral behavior. J. Stephen, *Liberty, Equality, Fraternity* (2d Ed. 1874); P. Devlin, *The Enforcement of Morals* (1968). This is hardly the occasion to examine the pros and cons of the Stephen-Devlin-Kristol thesis.[10] But it is the occasion to state that the legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.[11] And it is an activity that I could not countenance this Com-

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[10] The classic case against the thesis is, of course, John Stuart Mill's, *On Liberty* (1859), the target of Stephen's (and to a lesser degree Devlin's) attack. For a concise but penetrating modern defense of Mill and a critique of Stephen's and Devlin's arguments, see H.L.A. Hart, *Law, Liberty and Morality* (1963).

[11] Which is not to deny that moral considerations may align with and provide some support for laws whose aim is utilitarian protection of individuals or society, a point well-developed by Hart, *supra.*

mission engaging in. Neither the Communications Act nor 18 USC 1464 invests the FCC with a general power to establish canons of acceptable decency or good taste in programming. We cannot make the claim that Lord Mansfield made for his tribunal:

> Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.

Jones v. *Randall* (1774), quoted in Hart, *supra,* p. 7. However the matter stood in 18th century England—or indeed 20th century England [12]—I trust no one doubts that things are different in the United States today.

Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hard-bitten libertarians

[12] Mansfield's dictum has taken on new life as a result of the House of Lords' decision in *Shaw* v. *Director of Public Prosecutions*, 2 All Eng. Rep. 446 (1961). The opinion of Lord Simonds is particularly noteworthy in this respect: "When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offenses which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society."

do not find entirely uncongenial.[13] Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

IV. CONCLUSION

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside

[13] Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, *Ibid.* I hope we do not qualify for that exception.

boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force*. This agency, in my view, has the power to compel that coexistence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

F.C.C. 76-271

Before the Federal Communications Commission

Washington, D.C. 20554

IN THE MATTER OF A "PETITION FOR CLARIFICATION OR RECONSIDERATION" OF A CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION, STATION WBAI (FM), NEW YORK, N.Y.

MEMORANDUM OPINION AND ORDER

(Adopted: March 19, 1976; Released: March 23, 1976)

By the Commission: Commissioner *Reid* concurring in the result.

1. The Commission has under consideration a "Petition for Clarification or Reconsideration" of its declaratory order in the matter of *Pacifica Foundation,* 56 FCC 2d 94 (1975), filed by the Radio Television News Directors Association (RTNDA). In its order the Commission clarified the standard it employs to determine whether and under what circumstances language depicting sexual and excretory activities and organs is indecent. The Commission concluded that its action was required to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), and to enforce the indecency provision of 18 U.S.C. § 1464.

2. The declaratory order was occasioned by a complaint concerning language broadcast by station WBAI(FM), New York, New York. The Commission

stated that its primary concern was the protection of children from language which most parents consider inappropriate for them to hear:

> * * * the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 56 FCC 2d at 98.

Thus, the Commission never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it. The Commission emphasized that it did not intend to "stifle robust, free debate on any of the controversial issues confronting our society" nor to "force upon the general listening public debates and ideas which are 'only fit for children.'" 56 FCC 2d at 99. It further noted that the real solution to this problem was the "exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 56 FCC 2d at 100.

3. RTNDA now seeks a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program." Citing as an example "audio and video 'actualities' of angry political demonstrations and even more structured political debate, interviews and conversations * * * ", RTNDA states that the order will cause licensees to censor programming and

this would "not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason * * * , regularly and publicly use language which a majority of the public considers to be indecent * * * ." Accordingly, RTNDA asserts that the Commission probably did not intend that its standard be applied in such situations, and requests appropriate clarification. Alternatively, if the Commission did intend such an application, it asks that we reconsider.

4. We note that our declaratory order was issued in a specific factual context. We share petitioner's concern that we must take no action which would inhibit broadcast journalism.[1] However, we differ with RTNDA's view that our order will have such an effect. By our order we sought primarily to protect young children from sexually explicit language. See *Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397 (1975). We intimated that such language could be broadcast—in a news or public affairs program or otherwise—when the number of children in the audience was reduced to a minimum, if sufficient warnings were given to unconsenting adults and if in the context used the language had serious literary, artistic, political or sci-

[1] Footnote 5 of RTNDA's Petition calls to our attention the fact that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. *Cf. NBC* v. *FCC*, 516 F. 2d 1101, 1153 (1974); Tamm, J. dissenting. We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes.

entific value. Having said this, we will not comment on the various hypothetical situations posed by RTNDA.

5. Our disinclination to discuss this subject further in the absence of a concrete factual context is in accord with our long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them. *Yale Broadcasting Co.* v. *FCC,* 478 F. 2d 594, 602 (D.C. Cir. 1973); see also Bickel, *The Unpublished Opinions of Mr. Justice Brandeis,* pp. 2–3 (1957).

6. In view of the foregoing IT IS ORDERED, That RTNDA's "Petition for Clarification or Reconsideration" is GRANTED to the extent indicated in footnote 1 and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

III

Opinions and Orders of the
United States Court of Appeals (D.C. Cir.) in
PACIFICA FOUNDATION *v.* FCC AND U.S.

United States Court of Appeals for the District of Columbia Circuit

No. 75–1391

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communications Commission

Argued March 30, 1976—Decided March 16, 1977

Harry M. Plotkin, with whom *Thomas Schattenfield, David F. Tillotson* and *Mary Candace Fowler,* were on the brief for petitioner.

Joseph A. Marino, Counsel, Federal Communications Commission with whom *Ashton R. Hardy,* General Counsel, *Raymond L. Strassburger* and *Richard J. Bodorff,* Counsel, Federal Communications

[Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.]

Commission and *Robert J. Wiggers*, Attorney, Department of Justice, were on the brief for respondent. *Daniel M. Armstrong,* Associate General Counsel, Federal Communications Commission, also entered an appearance for respondents.

Henry Geller and *Charles M. Firestone* filed a brief on behalf of the Committee for Open Media, San Francisco Chapter, as *amicus curiae.*

Before: BAZELON, *Chief Judge,* TAMM and LEVENTHAL, *Circuit Judges.*

Opinion filed by *Circuit Judge* TAMM.

Concurring opinion filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* LEVENTHAL.

TAMM, *Circuit Judge*: This appeal by Pacifica Foundation (Pacifica) challenges a Federal Communications Commission (FCC or Commission) ruling which purports to ban prospectively the broadcast, whenever children are in the audience, of language which depicts sexual or excretory activities and organs, specifically seven patently offensive words.

Without deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected, we find that the challenged ruling is overbroad and carries the FCC beyond protection of the public interest into the forbidden realm of censorship. For the reasons which follow, we reverse the Commission's order.

I. FACTUAL BACKGROUND

On the afternoon of October 30, 1973, station WBAI, New York, New York (which is licensed to

Pacifica), was conducting a general discussion of contemporary society's attitude toward language as part of its regular programming. The WBAI host played a segment from the album, "George Carlin, Occupation: Foole," Little David Records. Immediately prior to the broadcast of the Carlin monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some. Those who might be offended were advised to change the station and return to WBAI in fifteen minutes. The monologue consisted of a comedy routine that was almost entirely devoted to the use of seven four-letter words depicting sexual or excretory organs and activities.

On December 3, 1973, the Commission received a complaint from a man in New York stating that, while driving in his car with his young son, he had heard the WBAI broadcast of the Carlin monologue. This was the only complaint lodged with either the FCC or WBAI concerning the Carlin broadcast.

The Commission determined that clarification of its definition of the term "indecent" was in order. As a result, in *Pacifica Foundation,* 56 F.C.C. 2d 94 (1975) (hereinafter *Order*), the Commission defined as indecent, language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. The Commission found that the seven four-letter words contained in the Carlin monologue depicted sexual or excretory organs and activities in a patently offensive manner, judged by contemporary community standards for the broadcast medium, and accordingly, were indecent. The Commission prohib-

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ited them from being broadcast under the authority granted it by 18 U.S.C. § 1464 (1970).[1] As a further rationale for its decision, the Commission cited its statutory obligation to promote the larger and more effective use of radio in the public interest.[2]

The underlying rationale of the *Order* can be traced to the Commission's view of broadcasting vis-a-vis other modes of communication and expression. According to the Commission, the broadcasting medium carries with it certain unique characteristics which distinguish it from other modes of communication and expression. In the Commission's view the most important characteristic of the broadcast medium is its intrusive nature. Unlike other modes of expression, the television or radio broadcast comes directly into the home without any significant affirmative activity on the part of the listener. *See Eastern Educational Radio (WUHY–FM)*, 24 F.C.C. 2d 408 (1970); *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F. 2d 397 (D.C. Cir. 1975). In the *Order* the FCC concluded this intrusive nature was a critical factor due to four important considerations: (1) children have access to radios and in some cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra defer-

[1] 18 U.S.C. § 1464 (1970) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[2] 47 U.S.C. § 303 (1970) provides: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, necessity or interest requires, shall:

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest * * * *."

ence; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. *Order* at 97.

In light of these considerations the Commission felt that questions concerning the broadcast of patently offensive language should be dealt with in a public nuisance context. As a result the Commission determined that the principle of channeling[3] should be borrowed from nuisance law and applied to the broadcasting medium. Rather than prohibit the broadcast of indecent language altogether, the Commission sought to channel it to times of the day when it would offend the fewest number of listeners.

In hopes of avoiding the charge that the *Order* was overbroad, the Commission declared that the channeling was specifically intended to protect children from exposure to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. *Order* at 98.

Finally, the Commission did note that when the number of children in the audience is reduced to a minimum, a different standard might conceivably be used. In such an analysis the definition of indecent would remain the same, however, the Commission would also consider whether the material had serious

[3] The law of nuisance does not say, for example, that no one shall maintain a cement plant; it simply says that no one shall maintain a cement plant in an inappropriate place, such as a residential neighborhood.

literary, artistic, political or scientific value. *Order* at 100.

In concurring statements, Commissioners Reid and Quello felt the *Order* did not go far enough. Commissioner Reid believed indecent language was inappropriate for broadcast at any time. Commissioner Quello was in agreement, commenting that "garbage is garbage" and it should all be prohibited from the airwaves. *Id.* at 102, 103.

Appellant Pacifica argues that section 1464 is unconstitutionally vague unless the term indecent is subsumed by the term obscene as defined in *Miller* v. *California,* 413 U.S. 15 (1973). Pacifica contends that the Supreme Court, in *Hamling* v. *United States,* 418 U.S. 87 (1974) and *United States* v. *12 200 Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), has made it clear that the term indecent, as used in federal criminal statutes, must be construed as referring to material involving the specific types of explicit conduct defined in *Miller* v. *California,*[4] *supra,* in order for the constitutionality of the statute employing the term to be sustained. Pacifica also cites numerous other federal and state court decisions which have invariably held that the term indecent, as used in criminal statutes, refers to material which appeals to prurient interest as distinguished from material

[4] The *Miller* standard is:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

which is merely coarse, rude, vulgar, profane or opprobrious.[5]

Pacifica argues that the Carlin monologue is not obscene because it does not appeal to any prurient interest and because it has literary and political value. Therefore, Pacifica argues it is entitled to constitutional protection in light of *Miller* and *Hamling, supra.* Pacifica concludes that such constitutional protection means that these words may not be prohibited by section 1464. In addition, Pacifica contends that the non-obscene language used in the Carlin monologue does not come within the fighting words prohibition set forth in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

Finally, Pacifica contends that the FCC standard of indecency, as expressed in the *Order,* is overbroad as it does not assure that programs of serious literary, artistic, political or scientific value will be allowed to air.[6] The amicus brief in this appeal argues that the *Order* is too far-reaching and will have an especially harsh effect on the broadcast of literature depicting minority cultures. In addition, the amicus brief quotes studies,[7] which show that large numbers of children are in the broadcast audience until 1:30 a.m., as further evidence that the *Order* is overbroad.

One week prior to oral argument in this case the FCC released a memorandum and order seeking to clarify its earlier *Order.* The order of clarification[8]

[5] Pacifica's Brief at 24, n. 23.

[6] *See* App. B. at 28, et seq.

[7] Amicus's Brief at 17 *quoting* Statement of John A. Schneider, Before the House Subcommittee on Communications, July 15, 1975, p. 9.

[8] Pacifica Foundation, —— F.C.C. 2d. ——, 36 P&F Radio Reg. 2d 1008 (1976).

was in response to a petition filed by the Radio Television News Directors Association. In the clarification order, the Commission declared that it never intended to place an absolute prohibition on the broadcast of indecent language but only sought to channel it to times of the day when children would least likely be exposed to it.[9] The clarifying order, in attempting to narrow the scope of the original *Order,* ruled that indecent language could be broadcast in a news or public affairs program or otherwise if it was aired at a time when the number of children in the audience was reduced to a minimum, if sufficient warning were given to unconsenting adults, and if the language in context had serious literary, artistic, political or scientific value.[10] The Commission determined that it would be inequitable to hold a licensee responsible for indecent language broadcast during live coverage of a newsmaking event.[11] The Commission thought it better to trust the licensee to exercise judgment, responsibility and sensitivity to the needs, interest, and tastes of the community.[12]

II. Resolution

Despite the Commission's professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the *Order* the Commission has ignored both the statute which forbids it to

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

censor radio communications[13] and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.[14]

The Commission claims that its *Order* does not censor indecent language but rather channels it to certain times of the day. In fact the *Order* is censorship, regardless of what the Commission chooses to call it. The intent of the Commission is clear. It is to keep language that describes sexual or excretory organs and activities from the airwaves when there is a reasonable risk that children may be in the audience. The Commission expressly states that this language has "no place on radio" and that when children are in the audience a claim that it has literary, artistic, political or scientific value will not redeem it. *Order* at 98.

As the study cited by the amicus curiae, *supra* note 7, illustrates, large numbers of children are in the broadcast audience until 1:30 a.m. The number of children watching television does not fall below one million until 1:00 a.m. As long as such large numbers of children are in the audience the seven words noted in the *Order* may not be broadcast. Whether the broadcast containing such words may have serious

[13] 47 U.S.C. § 326 (1970) provides: "Nothing in this Act [The Communications Act of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

[14] *See* Sonderling Broadcasting Corp., 41 F.C.C. 2d. 777 (1973); Jack Straw Memorial Foundation, 29 F.C.C. 2d 334 (1971); Columbia Broadcasting System, Inc., —— F.C.C. 2d ——, 21 P&F Radio Reg. 2d 497 (1971); Oliver R. Grace, 22 F.C.C. 2d 667 (1970).

artistic, literary, political or scientific value has no bearing on the prohibitive effect of the *Order*. The Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*.[15]

Section 326 of the Communications Act specifically prohibits the FCC from interfering with licensee discretion in programming. *Writers Guild of America, West, Inc.* v. *FCC,* No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976). Such interference is exactly what the *Order* calls for. Therefore it is an action which takes the Commission beyond the limits of the powers which Congress has delegated to it. Congress specifically withheld from the Commission any power to censor broadcasts. *Anti-Defamation League of B'Nai B'Rith* v. *FCC,* 403 F. 2d 169 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969); 47 U.S.C. § 326 (1970). Any examination of thought or expression in order to prevent publication of objectionable material is censorship. 403 F. 2d 169.

In an effort to sustain the validity of its *Order* the Commission labels its prospective ban a channeling mechanism. The label is unimportant, the effect of the *Order* is critical. The effect is that of censorship and that is beyond the mandate of the FCC.

In past decisions the Commission has recognized the ban against censorship and has taken another tack against indecent language. In *Jack Straw Memorial Foundation,* 29 F.C.C. 2d 334 (1971), the Commission determined that the decision whether to broadcast obscene or indecent language was a licensee decision. In this case, the licensee, after careful consideration, broadcast the record, "Murder at Kent State", which contained language which the licensee considered obscene and ordinarily would not have permitted to be broadcast. The trustees and managerial employees decided that in their judgment the use of the particular language was necessary under the circumstances. In its ruling the Commission held that

> [t]his is a matter of judgment which we conclude the Commission has left to the licensee. In this case, language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid accurate account of a disasterous incidence in our recent history. We conclude that on this exercise of judgment, the licensee conformed to standards prescribed by the Commission as well as its own policies regarding suitability.

29 F.C.C. 2d at 354. In *Oliver R. Grace,* 22 F.C.C. 2d 667 (1970), the Commission, recognizing that section 326 of the Communications Act prohibited it from censoring broadcast matter, held that program choice was the responsibility of the licensee; the licensee was required to ascertain and reasonably serve the needs and interests of his community; and the charge that programs are vulgar or presented without due regard for sensitivity, intelligence, and taste, was not properly cognizable by the Commission, in light of the proscription against censorship. *Id.* at 668.

The importance of independent judgment by local licensees has been affirmed again and again by the FCC and the courts.[16] Perhaps the most important

[15] App. B. at 28-39.

[16] *See Writers Guild of America, West, Inc.* v. *FCC,* No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976); Report on Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C. 2d 418 (1975); Network Programming Inquiry, 39 Fed. Reg. 26372 (1974). En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

ruling for our purpose is the Commission's clarification memorandum regarding the original *Order*. There the Commission recognized that

> in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing. Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language.

Pacifica Foundation, —— F.C.C. 2d ——, 36 P & F Radio Reg. 2d 1008, 1009 n. 1 (1976). Thus the Commission indirectly admitted it had gone too far in banning "indecent" language from the airwaves. The Commission decided it would be better to trust the licensee to exercise judgment, responsibility and sensitivity to the community's needs, interests and tastes. *Id.*

Previously the Commission has readily admitted that its authority in the area of profane, obscene, or indecent language is governed by federal statutes as interpreted by the courts. The FCC has recognized that it must perform its duties in this area without infringing upon constitutional guarantees of freedom of speech and of the press, *Columbia Broadcasting System, Inc.,* —— F.C.C. 2d ——, 21 P & F Radio Reg. 2d 497 (1971), and without violating the statutory obligations of section 326 of the Communications Act. It must continue to do so.

We do not find it necessary to determine whether the term "indecent" can be more narrowly defined than the term "obscene". The FCC's position is that "indecent" language may be distinguished from "obscene" language in that it lacks the element of appeal to prurient interest and that when children are in the audience it cannot be redeemed by a claim that it has

literary, artistic, political or scientific value. *Order* at 98.

This question has confronted other courts but there have been no definitive resolutions as yet. In *Gagliardo* v. *United States,* 336 F. 2d 720 (9th Cir. 1966), the Ninth Circuit left open the question whether indecent, as used in section 1464, could be defined differently from obscene. Although the question of whether indecent might mean something different from obscene was raised in *Tallman* v. *United States,* 465 F. 2d 282 (7th Cir. 1972), it was not resolved since the case had only been tried on the theory that the defendant had uttered obscene language. The question was considered only tangentially in *United States* v. *Smith,* 467 F. 2d 1126 (7th Cir. 1972), where the court reversed a conviction under section 1464 on the grounds that the jury had not been instructed as to the meaning of the statutory terms profane and indecent, even though the case had been presented to the jury under an indictment charging the defendant with uttering obscene, indecent and profane language. In reversing the conviction, the court did not suggest in what way, if at all, indecent language might differ from obscene language. It is evident therefore that the term indecent has never been authoritatively construed by the courts in connection with section 1464. Since we feel section 326 of the Communications Act is dispositive of this appeal we do not find it necessary to resolve this difficult question.

Unquestionably the Commission's *Order* also raises First Amendment considerations. The Commission recognized that Congress had prohibited it from engaging in censorship or interfering "with the right of free speech by means of radio communication." [17] In

[17] 47 U.S.C. § 326 (1970).

the *Order,* the Commission contends that because of its unique qualities the broadcast medium is not subject to the same constitutional standards that may be applied to other less intrusive forms of expression.

There is no doubt that the regulatory authority of the FCC encompasses more than the technical engineering aspect of the broadcast medium. Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, including broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act.

The requirements of the First Amendment relating to obscenity are found in *Miller* v. *California,* 413 U.S. 15 (1973). In *Miller,* the Court set forth a subjective standard by which the trier of fact could determine whether material was obscene. The standard developed by the Court involves: (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) artistic, political or scientific value. *Miller,* 413 U.S. at 24.

Applying the *Miller* standard to the language used in the Carlin monologue, it is clear that although the language is crude and vulgar by most standards it is not obscene. The FCC agrees. *Order* at 98. As used, the words do not appeal to the prurient interest.[18] They are merely crude statements and are not used to titillate. Furthermore, the words prohibited by the

[18] *See* App. A at 10–12.

Order may often be connected with programs in the public interest, e.g. plays and live news broadcasts. Thus, these words quite possibly could have literary, political or artistic value. Therefore this non-obscene speech is entitled to First Amendment protection.

The Commission claims an exception from First Amendment requirements in order to carry out its duty to promote the use of radio communications in the public interest. The basis of this claim is that the broadcast medium is unique. Assuming, arguendo, that the FCC has the power to prohibit non-obscene speech from being broadcast, the statute or order instituting such a ban must not be overbroad or vague. *See Young* v. *American Mini Theatres, Inc.,* 96 S. Ct. 2440 (1976). As will be illustrated, the *Order,* in its application of Section 1464, suffers from overbreadth and vagueness.

In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), the Court held that rigorous constitutional standards apply when government attempts to regulate expression. Furthermore, when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Id.* at 209. Indeed, when First Amendment freedoms are at stake, the Court has repeatedly emphasized that precision of drafting and clarity of purpose are essential. *Id.* at 217–18.

The FCC's regulation of speech per its *Order* fails to meet the rigorous standards of the Supreme Court. A look at *Erznoznik* will help illustrate why. There a municipal ordinance made it unlawful for a drive-in theater to exhibit any motion picture in which the

human male or female buttocks, human female bare breasts or human bare pubic areas where shown. The city attempted to sustain the ordinance as an effort to protect children. The Court held that minors are entitled to First Amendment protection and only in relatively narrow, well-defined circumstances may the government bar public dissemination of protected materials to them. *Erznoznik,* 422 U.S. at 212–13. The Court found the ordinance overbroad in that it sweepingly forbid the display of all films containing any uncovered breasts or buttocks, irrespective of context or pervasiveness. *Id.* at 213. Mr. Justice Powell, writing for the majority, stated that

> [s]peech that is neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

422 U.S. 213–14.

The situation in this appeal is quite similar to that in *Erznoznik.* The *Order* prohibits the broadcast of seven words at times of the day when there is a reasonable risk that children will be in the audience. Thus, the *Order* sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be. For instance, the *Order* would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona.* Certain passages of the *Bible* are also proscribed from broadcast by the *Order.*[19] Clearly every use of these seven words cannot be deemed offensive even as to minors.

[19] In addition, works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift and the Nixon tapes, would not be allowed to air.

In this regard the *Order* is overbroad. It is not saved by the attempted clarification, for that order would only permit the words to be broadcast on live news shows or very late at night.[20]

In addition, the *Order* is vague in that it fails to define children. Need a nineteen year old and a seven year old be protected from the same offensive language? The Supreme Court has held that in assessing the requisite capacity of individual choice the age of the minor is a significant factor.[21] The *Order* does not even consider age as a factor, much less a significant one.

The Commission also attempts to justify its *Order* by claiming that, due to the intrusive nature of broadcasting, a captive audience is present. This argument is persuasive when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. However, as the Supreme Court noted in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302 (1974), "[t]he radio can be turned off."

Cohen v. *California,* 403 U.S. 15 (1971), is also analogous to the present situation. Cohen was convicted of violating California Penal Code Section 415, which prohibits "maliciously and wilfully disturb-[ing] the peace or quiet of any neighborhood or person * * * by * * * offensive conduct * * *." Cohen had walked in a public corridor of the Los Angeles County Courthouse wearing a jacket inscribed with a four-letter word. California argued that the state may act to protect the unwilling or unsuspecting viewers from unavoidable exposure to such language. *Id.* at 21. This reasoning is similar to the FCC's expressed

[20] *Pacifica Foundation, supra,* note 8.

[21] *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

desire to protect the unsuspecting dial scanner from crude, offensive programming. In *Cohen,* the Court held that government control of objectionable speech can be tolerated only when substantial privacy interests are being invaded in an essentially intolerable manner. 403 U.S. at 21. Such an invasion had not occurred in *Cohen,* the Court found, because the offensive expression had occurred in public and because citizens could avoid it easily by averting their eyes. *Id.* Likewise, one can argue an intolerable invasion of privacy would not occur in the broadcast setting. Privacy expectations, even in the home, diminish when listeners choose to gain access to a public medium.[22] The dial scanner may avoid exposure simply by turning the dial. The Commission itself has recognized that listeners do not possess any right to be free from all unpleasantness.[23] In its effort to shield children from language which is not too rugged for many adults the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for children. The Commission's *Order* is a classic case of burning the house to roast the pig. *See Butler* v. *Michigan,* 352 U.S. 380, 383 (1957).

As defined by Congress, and refined by the FCC and the courts, public interest has always been understood to require licensees to offer some balance in their

[22] *See Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity,* 61 Va. L. Rev. 579 (1975).

[23] Clarification of Section 76.256 of the Commision's Rules and Regulations, 59 F.C.C. 2d 984 (1976).

program format. *See Renewal of Standard Broadcast and Television License,* 14 F.C.C. 2d 1, 8 (1968). Obviously balanced programming requires more than just programs suitable for children. Speech cannot be stifled by the government merely because it would draw an adverse reaction from the majority of the people. *Bazaar* v. *Fortune,* 476 F. 2d 570, 579 (5th Cir.), *modified,* 489 F. 2d 225 (1973).

The Commission assumes that absent FCC action, filth will flood the airwaves. Thus the Commission argues that the alternative of turning the dial will not aid the sensitive person in his efforts to avoid filthy language. The *Order* provides no empirical data to substantiate this assumption. Moreover, the assumption ignore the forces of economics and of ratings on the substance of programming. Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears.[24] Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills.[25] If they are correct, and if the Commission truly seeks only to

[24] *See Filthy Words, supra* note 18, at 615.

[25] *Id. citing* N. Johnson, How to Talk Back to Your Television Set, 20–21 (1967); N. Minow, Equal Time, the Private Broadcaster and the Public Interest.

enforce community standards, the market should limit the filth accordingly.[26]

Conclusion

As we find that the Commission's *Order* is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. § 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its *Order* is overbroad and vague, therefore we must reverse the *Order*. We should continue to trust the licensee to exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes. To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.

So ordered.

Bazelon, *Chief Judge, concurring*: Although I agree with the result reached by Judge Tamm, I be-

[26] *See Filthy Words*, *supra* note 18, at 615.

As a final word we take note of a news account which, under the headline "Swearing by British Rock Band Enrages Television Viewers", reported the reaction of the British television audience to a broadcast containing filthy language. According to the report members of a rock band had used a string of obscenities on a London television program which had aired at 6:00 p.m. (The Washington Post, December 3, 1976, Style section, at 7, col. 2) Following the broadcast thousands of angry calls jammed the switchboard at Thames Television Studios and thousands of others were received by the London newspapers in protest of the broadcast. Thames Television broadcast an apology later the same evening and the host of the program planned to make a personal apology on the air the following evening. In this instance it seems rather clear that the London community was offended by what it had heard and that its reaction thereto stemmed any tide of filth that may have been headed its way.

lieve it is necessary to determine whether the Commission's *Order* abridges the First Amendment. I will discuss why this issue must be reached and then explain why the Commission's definition of "indecent" speech is unconstitutional.

I

Judge Tamm concludes that the Commission's definition of "indecent" must be invalidated because it authorizes censorship forbidden by 47 U.S.C. § 326. Section 326 provides that nothing in the Communications Act shall be understood as giving the Commission "power of censorship" or authority to "interfere with the right of free speech." I agree with Judge Tamm that the Commission has censored.[1] The Commission has banned the broadcast of certain words during all but the late night hours, and possibly dur-

[1] Unfortunately, I am unable to agree with Judge Tamm's related conclusion that the Commission customarily honors the limitations on its authority to regulate constitutionally protected speech. *See* WUHY-FM, 24 F.C.C. 2d 408 (1970); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *recon. denied*, 34 F.C.C. 101 (1963), *affirmed on other grounds sub nom. Robinson* v. *FCC*, 334 F. 2d 534 (D.C.Cir.), *cert. denied*, 379 U.S. 843 (1964). *See also* Armond J. Rolle, 31 F.C.C. 2d 533 (1970); the "raised eyebrow" harassment of KRAB-FM in Jack Straw Mem. Foundation, 21 F.C.C. 2d 833, *hearing ordered on recon.*, 24 F.C.C. 2d 266 (1970), *license renewed*, 29 F.C.C. 2d 334 (1971); Mile High Stations, Inc., 28 F.C.C. 795 (1960); WREC Broadcasting Service, 19 F.C.C. 1082 (1955); Note, *Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579 (1975); Note, *Offensive Speech and the FCC*, 79 Yale L.J. 1343, 1349, 1359–68 (1970), and cases cited. Ironically, one case where the Commission honored the limitations on its authority involved the same licensee, Pacifica Foundation, 36 F.C.C. 147 (1964).

ing those times as well.[2] The statute is thus facially violated, even though the ban is not absolute (as the Commission puts it, objectionable speech has merely

[2] The ban is not limited to words "as broadcast," as the dissenter asserts, (draft at p. 1–2), for the *Order* provides that language that is indecent under the Commission's standard may never be broadcast when children are likely to be listening. Instead of merely considering the words "as broadcast," the Commission adopted a legislative-type rule which it then applied to the facts of the case. As the Commission itself noted, it issued a declaratory order in this case because such a procedure is "admirably suited to terminat[ing] the present controversy * * * and to clarify[ing] the standards which the Commission utilizes to judge 'indecent language.'" 51 F.C.C. 2d at 434. It is true, though, that the adopted rule may not be applied at all times. During the late night hours, the *Order* cryptically states, a "different standard *might conceivably* be used." 51 F.C.C. 2d at 433 (emphasis added). The *Order* does not specify at what time the number of children in the audience will be sufficiently low to permit use of a relaxed standard. However, the Commission's own statistics show that in Washington, D.C., teenagers comprise 14.1 percent between 11:00 p.m. and midnight. *In re* WUHY–FM, 24 F.C.C. 2d 408, 411 n. 6 (1970). The Commission also found that in New York and Los Angeles, children of ages 11–17 comprise 13 percent of the 9:00 to 11:00 p.m. television audience, while those 6–11 comprise 5 percent. *Id.* This vagueness supports invalidation, not affirmation of the Commission's action.

The dissent recognizes that the Commission cannot constitutionally apply its rule at night when parents can supervise their children. (Dissenting draft at 10–11.) Under this logic, a similar conclusion would presumably be required when children are in school, possibly except during lunch hour and recess. The Carlin monologue was broadcast at 2:00 p.m. on Tuesday, October 30. *Order* at 431.

been "channeled" into certain hours).[3] By its terms, § 326 is not limited to rules that totally ban the broadcast of certain materials; it bans any Commission censorship.[4] Indeed, channeling may have substantially the same effect as an absolute ban. Channeling material into a small enough time slot would prevent many stations from airing that material[5] and would

[3] The Commission relies on *Williams* v. *District of Columbia*, 419 F. 2d 638 (D.C.Cir. 1969), and *Von Sleichter* v. *United States*, 472 F. 2d 1244 (D.C.Cir. 1972), for the proposition that regulation of offensive language should be governed by principles analogous to nuisance law. To the extent these cases permit a "nuisance" statute which proscribes words not obscene under *Miller* v. *California*, 413 U.S. 15 (1973), *see* text accompanying notes 7–9, *infra*, I think they are overruled by *Lewis* v. *City of New Orleans*, 415 U.S. 130, 134 (1974), and *Gooding* v. *Wilson*, 405 U.S. 518 (1972). In any event, the Commission misapprehends the meaning of "nuisance" as used in those cases. *Williams* and *Von Sleichter* do not hold that offensive words are a nuisance per se that can therefore be regulated. Rather, they relied heavily on the context in which the words were uttered, distinguishing the case of a stonemason who, after dropping a stone on his foot, utters swear-words that can publicly be heard, from the case of a person who verbally, rather than physically, assaults a person in a public place.

[4] The Senate Report regarding the 1948 amendment to § 326 states: [S]ection 326 * * * makes clear that *the Commission has absolutely no power of censorship* over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio.

S. Rep. No. 1567, 80th Cong., 2d Sess. 13014 (1948) (emphasis added).

[5] Amicus curiae, Committee for Open Media, San Francisco Chapter, asserts that roughly one-half of the nation's AM licensees (2,294 out of 4,488) operate only during the daytime. (Am. Br. at 18.)

effectively make it unavailable to many potential listeners.[6]

However, determining that the Commission has violated the literal command of § 326 does not, as Judge Tamm assumes, end the matter. Although the language of § 326 is very broad, the scope of that section is apparently limited by 18 U.S.C. § 1464 and 47 U.S.C. § 503(b)(1). Section 1464 provides criminal punishments for "[w]hoever utters any obscene, indecent, or profane language by means of radio," and § 503(b)(1) empowers the Commission to impose forfeitures on licensees who violated § 1464. In *Illinois Citizens Committee for Broadcasting* v. *F.C.C.*, 515 F. 2d 397 (D.C. Cir. 1974), the petitioners claimed that an obscenity forefeiture assessed by the Commission under the latter provisions violated both the First Amendment and § 326.[7] This court found that

[6] If material could only be shown after midnight, it would be missed by many people who have already gone to sleep. According to Nielsen, 70 percent of television households watch television between 9:00 and 10:00 p.m., 46 percent at 11:00 p.m., and 25 percent at midnight. *Nielsen Television, 1975*, p. 7.

[7] It is not entirely clear that the Commission is authorized to impose a forfeiture under § 503(b)(1) without a prior jury determination that § 1464 has been violated. The *Illinois Citizens Committee* court did not reach that issue. That appeal had been brought by a citizen group, rather than the fined licensee, and the court concluded the group lacked standing to raise the issue. 515 F. 2d at 403 n.13. The issue was not urged on this appeal. I merely note in passing that originally, the FCC was given enforcement powers over obscene broadcasts. *See Duncan* v. *United States*, 48 F. 2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). In 1948, the prohibition on obscene broadcasts was moved to Title 18 and nothing in Title 47 authorized the FCC to consider obscenity in a forfeiture proceeding. In 1960 Congress added § 503 to Title 47, Public Law 86–752, 74 Stat. 889. It was not stated whether the FCC was to have coordinate enforcement power with the Department of Justice. In any event, imposition of a fine would have been preferable to the "raised eyebrow" tactic the Commission used here.

the Commission had properly found that the program was constitutionally unprotected obscenity under *Miller* v. *California*, 413 U.S. 15 (1973). The forfeiture was upheld without comment on whether § 326 barred the Commission's action. The clear implication is that § 326 does not provide greater protection of speech than the First Amendment, at least with respect to offensive speech. If the court had thought otherwise, it could not have upheld the forfeiture simply by finding that the speech in question was unprotected under the First Amendment. Thus, to determine whether the Commission may regulate speech within its definition of "indecent," it is necessary to determine first whether such speech would be protected by the Constitution in other media; and if so, whether the unique character of broadcasting justifies the proposed expansion of government speech control.[8]

II

Several years ago, I felt compelled to write that "the FCC has demonstrated what one can most charitably describe as a total ignorance of the constitutional definition of obscenity." *Illinois Citizens Committee, supra*, statement of Bazelon, Chief Judge, as to why he voted to grant rehearing en banc, 515 F. 2d at 418. Unfortunately, this case would seem to confirm that view. The Commission's definition of "indecent" speech that may be banned from the airwaves is massively overbroad under *Miller* v. *California*, 413 U.S. 15, *rehearing denied*, 414 U.S. 81 (1973). Nor has the Commission demonstrated why offensive speech

The chilling effect of "associating" a finding of violation and threatening future unmentioned sanctions if the licensee's behavior does not improve is unmeasurable.

[8] Although the Commission evidently assumes that § 1464 authorizes it to assert control over speech that would be forbidden

that otherwise would be protected may be regulated at all when broadcast over the airwaves—or, specifically why the additional restrictions imposed are tailored to serve the justifications relied on for regulation.

Regulation of obscenity has produced "a variety of views among the members of the [Supreme] Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 704–05 (1968) (Harlan, J., concurring and dissenting). In *Roth* v. *United States,* 354 U.S. 476 (1957), a majority of the Court, although aware that "ideas having even the slightest redeeming social importance * * * have the full protection" of the First Amendment, concluded that there was a category of obscene speech that could be freely regulated because it lacked redeeming social importance. 354 U.S. at 484–85. After *Roth,* a majority or the Court retained the belief that obscene speech lies outside the First Amendment, the Court dividing over the difficult task of formulating a standard for distinguishing obscenity from that which is merely offensive. In the absence of a majority test, the Court initiated the practice,

(Continued)

in other media, 51 F.C.C. 2d at 432, neither the text nor the legislative history of § 1464 supports this view. But regardless of Congress' intent in passing § 1464, the grant of power to the FCC cannot exceed the bounds of the First Amendment. I will assume that the First Amendment sometimes may permit government to regulate broadcast speech more tightly than other speech, and that § 1464 empowers the Commission to assert the maximum amount of control over offensive speech permitted by the Constitution. On these assumptions it is not necessary to define all the modifications, assuming there are any, in traditional First Amendment principles that may be justified by the unique character of broadcasting. It is only necessary to determine whether the additional regulation embodied in the Commission's definition of "indecent" is permissible.

utilized thirty-one times, of summarily reversing convictions for the dissemination of materials that at least five Justices, applying their individual tests, found to be constitutionally protected. *Redrup* v. *New York,* 386 U.S. 767 (1967); *Miller,* 413 U.S. at 22, n.3. The Chief Justice believes this division of views "is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression." *Miller,* 413 U.S. at 22–23.

The Supreme Court's most recent attempt to resolve this uncertainty came in *Miller* v. *California, supra.* Acutely aware of the dangers inhering in any suppression of expression, the Court stated that the realm of permissible regulation must be "carefully limited." 413 U.S. at 23–24. A jury may find a work obscene "under contemporary community standards" only if the work (1) when taken as a whole, (2) appeals to the prurient interest, (3) portrays sexual conduct in a patently offensive way, (4) and lacks serious literary, artistic, political or scientific value. 413 at 24.[9] The Court further held that obscenity could be regulated only under a specifically defined law,[10]

[9] The fourth prong represents the major departure from prior case law. Previously, proof of obscenity required establishing that the material was "utterly without redeeming social value," *Memoirs* v. *Massachusetts,* 383 U.S. 413, 419 (1966). The *Miller* majority abandoned this strict test on the ground that it required the prosecution to do the impossible, namely, to prove a negative. 413 U.S. at 22.

[10] The *Miller* framework was followed in companion cases to assess the validity of federal regulation, *United States* v. *12 1200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States* v. *Orito,* 413 U.S. 139 (1973).

as written or authoritatively construed.[11] The Court said it had limited obscenity regulation to materials that "depict or describe patently offensive, hard core sexual conduct," *Id.* at 27. *See also, Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 69 (1972).

The Commission did not find that the Carlin monologue was obscene under *Miller.* Rather, it found that certain words repeated in the monologue were "indecent."[12] The Commission offered several justifications for "authoritatively construing" the statutory term "indecent," one of which was a desire to reformulate its earlier construction of that term in light of *Miller.*[13] Although the Commission alternatively argues that *Miller* is not the exclusive test for regulation of offen-

[11] To guide legislatures, the Court suggested two definitions of conduct that would satisfy the "patent offensiveness" prong of the test. The examples are:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. Judge Leventhal asserts that by including these examples the Miller Court was authorizing "a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent." (Dissenting draft at 4). This was not the Court's intent. Just one paragraph before it offered these examples of patently offensive behavior, the Court explicitly held that the standards for measuring obscenity are conjunctive—all must be met to suppress speech. By giving flesh to the meaning of "patent offensiveness," the Court was not abandoning this holding.

[12] In constitutional interpretation the customary deference to agency regulations is inappropriate. *See e.g. National Broadcasting Co., Inc.* v. *FCC,* 516 F. 2d 1101 (D.C. Cir. 1974).

[13] The Commission also cited *Illinois Citizens Committee, supra,* as a case that compelled reconsideration of an earlier definition of indecency. However, that case simply involved judicial review under *Miller,* the court expressly refusing to consider the constitutionality of that definition and application of the term "indecent." 515 F. 2d at 403–04, n. 14.

sive language, *see* Section III *infra,* analysis of the Commission's definition must begin with *Miller.* To begin with, *Miller* establishes when speech in other media may be regulated because it is offensive in a lewd or vulgar way, *see* note 22 *infra.* Furthermore, the Commission has in the past attempted to define indecency in terms of the Supreme Court's standard for obscenity, 51 F.C.C. 2d at 433, and has theorized that unregulated, indecent speech will cause social harm similar to that which is commonly associated with unregulated obscenity.[14] Since the Supreme Court has held that the concerns underlying obscenity justify only limited regulation, regulation of indecency must be subject to similar restraints absent other, compelling justifications.

Judge Leventhal's dissent is based in part on his view that the Commission attempted to "define 'indecent' in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.*" (dissenting draft at 3). Although the motiva-

[14] The Supreme Court has never definitively explained the justification for regulation of obscenity. Professor Kalven listed five possible justifications, all of which he found troubling; (1) the incitment to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; (4) the advocacy of improper sexual values; and (5) the impact of obscenity on character and hence, slowly and remotely, on conduct. Kalven, *Metaphysics of the Law of Obscenity,* 1960 S. Ct. Rev., 1. Little would be served by charting the history of the Supreme Court's acceptance or rejection of these and conceptually similar concerns. All that bears noting is the similarity of the Commission's fears regarding unregulated indecent speech: "Obnoxious, gutter language describing these matters [sexual and excretory activities or organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions. * * *" 51 F.C.C. 2d at 433. The Commission offered no empirical support for this proposition.

tions for regulating "indecent" and obscene speech do seem similar, the Commission's definition of indecency is massively over-broad under *Miller*. In fact, the Commission's definition disregards every *Miller* requirement but one.

To begin with, the Commission does not test the "indecency" of speech under "local community standards," but rather on the basis of what it terms "contemporary community standards for the broadcast medium." 51 F.C.C. 2d 433. The search for a national standard is understandable. Justice Brennan's argument, rejected in *Miller,* that a national standard of obscenity is appropriate under a national constitution is telling. *See Jacobellis* v. *Ohio,* 378 U.S. 184, 193–95. And *Miller* can be read as merely holding that application of local standards is constitutionally permissible rather than constitutionally required. 413 U.S. at 30–39. Finally, it may be that only a national standard is administratively feasible for the Commission. When scrutinized closely, however, the Commission's national standard appears chimerical. The Commission never solicited a jury verdict or expert testimony.[15] Nor did it rely on polls or letters of complaint.[16] The Commission simply recorded its conclusion that the words were indecent, thereby creating the suspicion that its national standard is in fact either the composite of the individual Commissioner's standards or what they suppose are the national standards.

[15] Although a jury verdict is evidently not required in obscenity cases in general, *Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Illinois Citizens Committee*, *supra*, 515 F. 2d at 406, it would seem to be an exceptionally sturdy mechanism for soliciting community standards.

[16] I seriously doubt, in any event, that letters of complaint would provide reliable guidance as to what offends national standards of obscenity. Since a person is more apt to write a letter concerning a broadcast he finds offensive than one he does not, even a significant number of complaints might only reveal the sentiments of only a small minority of viewers.

The Commission's definition of indecency also disregards or distorts each of the other *Miller* requirements. First, appeal to the prurient interest is not to be considered. Second, a work is not judged as a whole. Rather, a work is banned if it contains "obnoxious, gutter language" that could be used offensively to describe sexual or excretory activities or organs. 51 F.C.C. 2d 433.[17] Finally, a work containing indecent langage cannot be broadcast even if the entire work has tremendous overriding literary, artistic, political or scientific value. *Id.*[18]

The only *Miller* requirement observed by the Commission is that the banned language be patently offensive. But uprooting this element from the others distorts its meaning. Under the Commission's definition, its *Order* could not itself be read over the airwaves even though it is not obscene under *Miller*. The *Order* has no appeal to the prurient interest and, as a whole, has serious value. Despite this, it would be banned because it contains words the Commission claims "debas[e] and brutaliz[e] human beings by

[17] Carlin's use of the "dirty words" was designed in part to demonstrate that they have acquired many popular meanings, apart from their literal meanings. For example, the phrase "I'm shitfaced" has nothing to do with an excretory activity or organ. It means, "I am drunk." The irony of the *Order* is that non-"obnoxious" synonyms for the dirty words (such as "feces" for "shit") are not banned even though such synonyms are only understood in their literal, "obnoxious," sense.

[18] Judge Leventhal argues that judicial review of Commission obscenity determinations compensates for the missing jury because "[j]udicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific value." (dissenting draft at 9). This statement is puzzling because, except possibly during the late night hours, a work containing indecent speech is banned regardless of its social value. 51 F.C.C. 2d 433.

reducing them to their mere bodily functions." 51 F.C.C. 2d at 433.

The Commission's definition of indecent speech that may be freely regulated thus goes well beyond *Miller* and is prima facie unconstitutional, notwithstanding the Commission's attempts to minimize the significance of the *Order*. In addition to its point about channelling, *see* text and notes at notes 1–6 *supra,* and its claim that only a few words will be affected, the Commission disclaimed any intent "to stifle robust, free debate." 51 F.C.C. 2d at 434. The implication is that only words and not ideas are being suppressed. However, the Supreme Court has rejected this very argument. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U.S. 15, 26 (1970). Since words "are often chosen as much for their emotive as cognitive force," *id.,* a person's choice of words is an important and protected element of the overall message sought to be communicated.

The Commission euphemistically characterizes its definition of indecency as "variable obscenity," citing *Ginsberg* v. *New York,* 390 U.S. 629. Under variable obscenity, the state can regulate dissemination of material to children that is obscene as to them, though not obscene as to adults. Variable obscenity "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests * * * 'of such minors.'" *Ginsberg,* 390 U.S. at 628, citations omitted. Even assuming that variable obscenity can

be regulated under § 1464, the Commission's definition of indecency is not a proper application of that concept.[19] To illustrate, the Commission did not purport to find that the Carlin monologue, when taken as a whole, appeals to the prurient interests of minors or that it was without serious value to minors. And even if the Commission had properly found that the monologue came within this definition, that finding alone would not justify absolute or near absolute suppression; the material might not be obscene as to adults. Regulation of speech that is obscene as to children but that adults are constitutionally entitled to hear would present difficult problems of accommodation, problems that the Commission has not squarely faced because of its assumption that its broad regulation of indecent speech is constitutional.[20]

In sum, the tight limits on obscenity regulation carefully formulated by the Supreme Court in *Miller* have been thoroughly disregarded. The Commission's definition can be affirmed only if, as it alternatively argues, there exists an additional category of offensive speech that is unprotected when broadcast.

III

According to the Commission, certain qualities unique to the broadcast medium justify suppression

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[19] *See* note 30 *infra.*

[20] The *Order* bans indecent speech whenever it is "reasonably likely" that children will be in the audience, which is all but the late night hours. Consequently, protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep. *See Young* v. *American Mini Theatres,* 96 S. Ct. 2453, 2455 (1976) (Powell, J., concurring). *See* note 30 *infra.*

of otherwise constitutionally protected speech.[21] Conceptually, the Commission's claim is that speech meeting its definition of "indecent" constitutes, when broadcast, an additional, previously unrecognized category of unprotected speech.[22] No single Supreme

[21] 51 F.C.C. 2d at 432. The Commission relied on the following language from *Burstyn* v. *Wilson*, 343 U.S. 495, 502–03 (1952): "[E]ach method [of expression] tends to present its own peculiar problems." The Commission evidently concludes from this statement that different First Amendment standards govern regulation of speech in different media. However, the entire passage reads: "[E]ach method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."

[22] Supreme Court authority suggests that obscenity is to be the sole category of speech that is unprotected because it may offend the sensibilities of listeners. First of all, the Court's twenty-year struggle to define obscenity suggests that the Court does not intend to recognize an additional category under a different heading. Furthermore, beginning with *Roth*, the Court has used the term "obscenity" as a legal short-hand to describe what government may constitutionally regulate under statutes that proscribe, for example, "obscene, lewd, lascivious, or filthy [books] of an indecent character." *Roth*, 354 U.S. at 476, n. 1. *See, e.g., Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200 Ft. Reels of Super 8 mm Film*, 413 U.S. 123 (1973); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962). Furthermore, there is an abundance of dicta in the Supreme Court's cases supporting this suggestion. *Miller* furnishes several examples:

> The States have a legitimate interest in prohibiting dissemination of exhibition of obscene material * * *. It is in this context that we are called upon to define the standards which must be used to identify * * * [what] a state may regulate.

413 U.S. at 19–20:

> We acknowledge, however, the dangers inherent in undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.

Id. at 23–24. And:

Court decision directly forecloses this argument. However, considerable guidance is contained in the several opinions in which the court has considered

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct * * *.

Id. at 27.

The implication of these and similar statements is that permissible regulation of offensive speech is co-extensive with *Miller*.

Finally, in several cases, perhaps best represented by *Cohen* v. *California*, 403 U.S. 15 (1971), the Court has overturned convictions based on offensive speech. In *Cohen*, a young man was prosecuted for walking through a courthouse wearing a jacket bearing the slogan "fuck the draft" and was convicted under a California statute that proscribed "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person * * * by offensive conduct." Finding that the case did not involve obscenity, fighting words, a captive audience or any other category of speech that may be regulated, the Court was squarely faced with the question of whether the state could regulate words simply because they were offensive. The Court stated that offensive language was a necessary side effect of promoting the broader First Amendment value of open-ended debate and that the "principle [of selective suppression] contended for the State seems inherently boundless." 403 U.S. at 25. It concluded that Cohen's conviction was unconstitutional. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (display of nudity on a drive-in movie screen); *Lewis* v. *City of New Orleans*, 415 U.S. 130, (utterance of vulgar epithet); *Hess* v. *Indiana*, 414 U.S. 105, (utterance of vulgar remark); *Papish* v. *University of Missouri Curators*, 410 U.S. 667, (indecent remarks in campus newspaper); *Brandenburg* v. *Ohio*, 395 U.S. 444, (utterance of racial slurs); or *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, (alluring portrayal of adultery as proper behavior). *Cf. Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976), where a majority of the Court did not endorse the proposition that offensive though non-obscene expression may be regulated in some ways if not altogether banned.

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conceptually similar justifications. All of the relevant case law directly opposes the action under review.

A. Offensive speech may offend the privacy interests of unconsenting adults in their homes

Two of the characteristics cited by the Commission are so closely intertwined that they should be considered together. The Commission fears that "unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast." It then observes that radio receivers are typically found in the home, where privacy interests are especially high, citing *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970). Since warnings can be aired prior to the broadcast of offensive material, the Commission evidently believes an adult listener should be able to indiscriminately scan the dial without chancing upon a program, even momentarily, he finds offensive.[23]

"The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205–210 (1974). Nevertheless, the Supreme Court has consistently held that the First Amendment generally prohibits government from "cleans[ing] public debate to the point where it is gramatically palatable to the most squeamish among us." *Cohen,* 403 U.S. at 25. In *Erznoznik,* for example, the Court held that a city ordinance banning the showing of movies containing nudity on

[23] According to the Commission, millions scan the dial every day. Sonderling Broadcasting Corp., 27 P&F RR 2d 285, 288, *recon. denied* 41 F.C.C. 2d 777 (1973), *affirmed sub nom.* Illinois Citizens Committee for Broadcasting, *supra;* WUHY-FM, Eastern Educ. Radio, 24 F.C.C. 2d 408, 411 (1970).

drive-in screens visible from the street could not be upheld in order to protect the sensibilities of involuntary passers-by. The Court said those who were offended could simply "avert their eyes." 422 U.S. at 211, 212. Similarly, in *Cohen, supra* n. 22, the Court held that offensive language could not be proscribed to protect the sensibilities of persons who might involuntarily be exposed to it:

> [T]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is * * * dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 23–34.

In *Cohen,* as in *Erznoznik,* the Court held the invasion on the privacy of unwilling viewers was not "intolerable" because of their ability to avert their eyes.

The Commission evidently believes that radio broadcast of offensive language constitutes an "intolerable invasion of substantial privacy interests." Radio waves are, as the Commission suggests, "intrusive" in some sense. They are "in the air" whether we like it or not.[24] But radio waves are not intrusive

[24] In its brief, the Commission quotes the following language from my opinion in *Banzhaf* v. *FCC* for the proposition that broadcast audience are "captive": "Written messages are not communicated unless they are read; and reading requires an affirmative act. Broadcast messages are 'in the air.'" 405 F. 2d 1082, 1100–1101 (1968), *cert. denied,* 396 U.S. 842 (1969).

in the same sense as "racuous emissions of sound trucks blaring outside * * * residences," which was cited as an example of an "intolerable invasion" in *Cohen*, 403 U.S. at 21.[25] Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, bring it home and then switches it "on." Having done these things, having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik*;

Banzhaf, however, is totally inapposite. The *Banzhaf* court relied squarely on the announced policy of both the executive and legislative departments, which were themselves based on convincing evidence, that cigarettes are carcinogens. Hence the court weighed a relatively minor intrusion on free speech against an officially documented threat against life itself, 405 F. 2d at 1097–99. Furthermore, the case was not based on a captive audience rationale; the court merely suggested that a television viewer must make an affirmative effort to disregard the commercial interruptions on a program he is watching. *Id.* at 1100.

[25] The Court has in other cases added that while it is permissible to regulate the raucous emissions of sound trucks on the theory that people are entitled to have the tranquility and privacy of their homes protected from intrusions which they are themselves powerless to prevent, governmental regulation of the "time, place and manner" of expression must be content-neutral. *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972); *Erznoznik*, *supra*; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Saia* v. *New York*, 334 U.S. 558 (1948); *Martin* v. *City of Struthers*, 319 U.S. 141, 151 (1943) (Murphy, J., concurring).

he can avert his attention by changing channels or turning off the set."[26]

There is language in *Cohen*, however, "that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g. Rowan* v. *Post Office Dept.* 397 U.S. 728 (1970)." 403 U.S. at 21. Although relied on by the Commission, *Rowan* does not in fact justify its *Order*. As the enunciation of the relevant test, citation of *Rowan*, and discussion of examples in *Cohen* suggest, *id.* at 21–22, the location of the unwilling listener is only one factor to be considered in determining whether speech is protected. Although a person *can* claim a greater privacy interest when at home, that interest is reduced when he "opens up his home" by turning on the radio. Indeed, when walking on the street one rarely receives prior warning of an offensive conversation.

Furthermore, the Commission's action is of an entirely different nature than that upheld in *Rowan*. There the Court upheld the constitutionality of a statute which enabled a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the householder.[27] *Rowan* enables a person who is offended by mail sent from a certain source to avoid further offense from that source. This privacy interest is similar to that naturally enjoyed by the radio listener—the right not to listen to stations he finds offensive. The *Rowan* Court noted that similarity of these interests when it wrote that invalidating the statue,

[26] In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), the Court noted, "The radio can be turned off, but not so the billboard or streetcar placard," *quoting Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932).

[27] 39 U.S.C. § 4009 (1964 ed., Supp. IV).

> would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.

397 U.S. at 737. More importantly, as the *Rowan* Court noted, by empowering the homeowner to determine what mail he will not receive, Congress avoided the Constitutional problems involved in "vesting the power to make any discretionary evaluation of the material in a governmental official." *Id.* The Commission, by assuming this very power, has gone well beyond *Rowan*.

B. Presence of Children in the Radio Audience

The argument advanced most strenuously by the Commission is that the ban on "dirty words" is necessary to prevent "the exposure of children to language which most parents regard as inappropriate for them to hear." 51 F.C.C. 2d at 433. The Commission theorizes that regulation is necessary because parents will frequently be unable to shield their children from such programming. No one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults, *Ginsburg* v. *New York, supra.* However, it does not follow that the regulation under review is permissible.

First of all, the Commission incorrectly assumes that material regulatable for children can be banned

from broadcast.[28] In *Butler* v. *Michigan,* 352 U.S. 380 (1957), the Court invalidated a state statute that absolutely banned the publication, sale or distribution of reading materials inappropriate for children. The Court said:

> The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual * * * that history has attested as the indispensable conditions for the maintenance and progress of a free society.

352 U.S. at 383–84.

The Commission's *Order* has substantially the same effect. Adults with normal sleeping habits will be limited to programs "fit for children." Should the Commission choose to regulate variable obscenity in the future, it must accommodate the right of government to regulate material that is obscene as to children with the rights of adults to hear speech protected as to them. If the Commission finds it impractical to accommodate these interests, any regulation must err on the side of under- rather than over-regulation. Any harm from under-regulation may be minimized by pre-program warnings and parental supervision. Any harm from over-regulation, on the other hand, is irremediable.

In any event the Commission has not shown that the proposed regulation is permissible even with respect to children. Its position is based on several undocumented assumptions. The most basic assump-

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[28] Since the *Order* only states that a more relaxed standard "might conceivably be used" during the late night hours, *see* note 2 *supra*, I assume the Commission believes it could impose an absolute ban. Nevertheless, for the rest of this paragraph I will assume the Commission will allow "indecent" speech to be aired late at night.

tion is that most parents consider any mention of dirty words to be unsuitable for their children. On top of this, the Commission assumes that parents frequently are unable to control their children's listening habits. A critical additional assumption (which I find difficult to accept) is that parents are less able to control their children's access to television and radio than to such media as books and newspapers. If this assumption is unfounded, then the major support for the Commission's argument that radio-TV should be distinguished from other media for speech regulation purposes is groundless.

Moreover, even if valid, those assumptions do not validate the *Order* since it rests on the premise that the Commission may censor material found by parents to be objectionable for their children. This unprecedented assumption [29] "seems inherently boundless," *Cohen,* 403 U.S. at 25. Parents might also wish to shield their children from programs advancing controversial political or religious beliefs or programs discussing difficult contemporary problems such as abortion. If the Commission can act *in loco parentis* by banning dirty words because they are objectionable, then the same logic justifies a ban on these and other types of programs.

Many parents believe—and perhaps rightly so—that children should not hear programs containing dirty

[29] The Commission improperly relies upon *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), where the Supreme Court held that an Amish parent's decision not to send his children to secondary school for religious reasons was constitutionally protected. *Yoder* recognizes that parents are entitled to make certain decisions respecting their children. This interest is infringed rather than promoted by the Commission's *Order*, which replaces parental authority with governmental authority.

words, and they may, of course, prevent their children from doing so. However, the Constitution limits the government's power to select programming for children. Although government may adopt more stringent controls with respect to children than adults on the theory that children lack the full capacity for choice that is the presupposition of First Amendment guarantees, *Ginsberg* v. *New York, supra, esp.* (Stewart, J. concurring), *at* 649–50, "[m]inors are entitled to a significant measure of First Amendment protection * * * and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik, supra,* 422 U.S. at 212. See also *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969). In fact,

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable.

Erznoznik at 213–14.

Thus the *Order* is clearly overbroad insofar as it is based on protection of children. As noted above, *see* text and note at note 19 *supra,* the Commission cannot plausibly claim that speech meeting its definition of "indecent" satisfies the constitutional test of obscenity, even as adjusted for children. In order to find that dirty words were obscene as to children, the Commission would at least have to find that their use, in context, appeals to youthful prurient interest. This has not been done and, frankly, I do not see how in-

dividual words could ever be found obscene, even as to children.[30]

Nor can this broad restriction be justified by any other governmental interest pertaining to minors. In fact, the Commission's motivation in protecting children from dirty words is essentially that which *Erznoznik* forbids, namely a desire to shield children from what the legislature deems offensive.

In reaching this conclusion, I am not championing the "cause" of indecent speech. The use of dirty words on the air, like the prevalance of violence, is a serious concern. Without a heightened sensitivity of the media, the pressure on First Amendment values will continue to grow. Violence in programming, however, may be more objectionable than the use of off-colored language; after all, children do not learn to kill each other with dirty words. Nevertheless, the Commission recently refused to ban violence on television, citing First Amendment concerns. *Report on the Broadcast of Violent, Indecent, and Obscene Material,* 51 F.C.C. 2d 418, 420 (1975).

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[30] *Ginsberg* v. *New York*, *supra*, which established the principle that obscenity could be assessed in relation to children, was decided before *Miller*. In *Erznoznik* the Court observed it had not had occasion to determine the effect of *Miller* on *Ginsberg*. However, the Court stated that not all nudity could be regarded as obscene as to children, because to be obscene expression must be in some way erotic. 422 U.S. at 213, n. 10. This statement implies that a finding of variable obscenity requires at least that the offensive material be judged in context and found to be prurient. In fact, there is language in *Miller* suggesting that the presence of children does not justify any additional regulation of speech: "This Court has recognized that the States have a legitimate interest in prohibiting disemination of obscene material when the mode of dissemination carries with it a significant danger or of exposure to juveniles. (Cites omitted). *It is in this context*, that we are called on to identify obscene material that a state may regulate * * *" 413 U.S. at 19–20 (emphasis added).

C. Scarcity of Spectrum Space

The final feature of broadcasting relied on by the Commission is the natural scarcity of broadcast channels. This reliance is misplaced. The ban on censorship in 47 U.S.C. § 326 reflects a Congressional judgment that scarcity does not justify content regulation. Indeed, although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.

The Commission relies on *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), where the Supreme Court upheld the constitutionality of the personal attack and political editorializing portions of the Commission's fairness doctrine. There the Court balanced the interests of broadcasters in freedom from control against the public's right to receive diverse viewpoints on matters of political importance. In this case, on the other hand, there is no divergence of First Amendment interests. The broadcasters' interest in freedom from content regulation is not incompatible with each member of the broadcast audience's interest in selecting his own programs and perhaps thereby attempting to influence the broadcaster's offerings. In fact, the *Red Lion* Court anticipated this situation when it wrote:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; * * * of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment isues.

395 U.S. at 396.

D. Miscellaneous justifications

The Commission also advances several subsidiary justifications for its action that are easily put aside. First, as Judge Tamm observes, the fear that filth will flood the airwaves without Commission regulation ignores economics. Popular tastes should be sufficient to ensure that the populace is not inundated with programming it finds objectionable.

Nor can the Commission's actions rest on its statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. 303(g). The Commission's statutory authority is not superior to the First Amendment. At most, specific components of the public interest can be relied on, as the Commission sought to do, to justify modifications in established First Amendment principles.

Finally, support for the Commission's action cannot be found in the fact government could have denied the public access to the airwaves altogether. I have long found such an argument puzzling. *See Brandywine-Main Line Radio, Inc.* v. *FCC,* 473 F. 2d 16, 67–68 (Bazelon, C. J., dissenting); Emerson, *The System of Freedom of Expression,* 660–61 (1970). Government also owns parkland and other facilities commonly used as public fora. Although the government may, in certain circumstances, forbid the use of certain locations altogether for public dialogue, any regulation it employs once it opens up a particular location for speech purposes must be content neutral. *Police Dept. of the City of Chicago* v. *Mosley, supra, Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969).

CONCLUSION

The impact of television [31] and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communications in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship. As Chief Justice Warren once observed, the impact of a particular medium constitutes no basis for subjecting that medium to greater suppression:

> This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

Times Film Corp. v. *City of Chicago,* 365 U.S. 43, 77 (1969) (Warren, C.J., dissenting).

LEVENTHAL, *Circuit Judge, dissenting*: The Commission's declaratory order was issued in FCC File No. BRH–13. *In the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI (FM) New York, New York.* The Declaratory Order consists of sixteen numbered paragraphs, followed by an Ordering paragraph. In the footnote I set out the Commission's *Conclusion,* which contains the three final numbered paragraphs, together with the Order-

[31] The Commission construes § 1464 as applying to spoken words that are broadcast. Thus § 1464 applies to television dialogue. The Commission has asked Congress to update the statute to refer explicitly to video depiction. *Report on Violen*[*ce*], *supra,* 51 F.C.C. 2d at 424.

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ing paragraph.[1] The majority vacates the order. I dissent.

The Appendix to this opinion contains the transcript of the George Carlin record. It may offend some sensibilities. But I think it important, especially because so many may be disposed to consider the matter in absolutist terms, just what material it is that the Commission has held was improperly broadcast in the

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CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY-FM* and *Sonderling*. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47

afternoon. This transcript is written, and it may well be more heavy handed than the monologue as heard on the radio. But counsel have not complained that the transcript format distorts or fails to present the issues.

I

The majority opinions treat the FCC's order as though it prohibited any TV or radio broadcast which included one of the seven words identified in the FCC's paragraph 14. The Commission held only "that the language *as broadcast* was indecent and pro-

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U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F. 2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3)

hibited by 18 U.S.C. 1464".[2] The words were identified as depicting "sexual activities and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media", and further identified as "prerecorded language with the words repeated over and over * * * deliberately broadcast." But over and above the Commission's focus on the deliberate repetition of these words, was a clear and crucial emphasis on the timing of the broadcast. It was vital to the order that the words were broadcast "in the early afternoon" when "children were undoubtedly in the audience." The order specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent particularly when children are in the audience" would not force on the general listening public ideas "fit only for children."

Commissioners Reid and Quello stated that in their view the declaratory order should have gone further and prohibited such language at any time of the day or night. That was a minority expression. Chairman Wiley concurred only in the result. Commissioner Robinson, joined by Commissioner Hooks, concurred on the ground of time limitation, as a reasonable measure "to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children

ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

[2] 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

would not ordinarily be exposed to the material—or at least not without the supervision of a parent."[3]

[3] Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hardbitten libertarians do not find entirely uncongenial.[12] Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be though inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

[12] Even Mill, second to none in advancing a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, *Ibid.* I hope we do not qualify for that exception.

IV. Conclusion

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of

In light of this array of concurrences, the Commission's decision must be read narrowly, limited to the language "as broadcast" in the early afternoon.

II

Exposure to children marks a special enclave in the law of freedoms of publication. Even the dissent of Justice Brennan in *Miller* v. *California,* 413 U.S. 15, 47, abstained from discussing state power over distribution to juveniles. As to children, it is obvious that the state has more latitude to require that certain movies, which are not censored generally, should nevertheless not be exhibited in performances to which children under 16 are admitted. The problem is that radio-TV broadcasting cannot be handled in so tailored a fashion.

In regard to broadcasting, the probable presence of children in the radio audience is relevant to a determination of obscenity. So we held in *Illinois Citizens Committee for Broadcasting* v. *FCC,* 169 U.S. App. D.C. 166, 173, 515 F. 2d 397, 404 (1975).

The FCC opinion under discussion refers to what is "indecent" rather than what is "obscene." If the term "indecent" were stretched to cover what would normally be included as, say, sacrilegious, it would depart too far from the context of section 1464.[4] But as I read the FCC's order, it reflects an effort to

decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force.* This agency, in my view, has the power to compel that co-existence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

[4] *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952).

define "indecent" in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.* In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation.

The majority opinions seem to consider "indecent" as a novel concept in the law, which should in their view not be extended beyond control of the "obscene." They wholly fail to take account of one aspect of *Miller,* which has not been much analyzed but which seems to me to have been deliberate and significant. The pre-*Miller* rulings had always defined "obscene" in terms of what appeals to the lewd and prurient interest, *e.g. Roth* v. *United States,* 354 U.S. 476, 487, the concept that had previously been defined. But *Miller* expanded on this—to include "patently offensive representations of * * * excretory functions." 413 U.S. at 25.[5] This is in substance a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent. And that is the *only* increment

[5] The concept of appeal to the prurient interest had previously been justified in some quarters on the ground that the material might stimulate sexual activity. Obviously, the representation of excretory functions would not stimulate excretory activity. It might sexually stimulate some seriously disturbed persons, but so might any fetish, such as a shoe. While *Miller* and accompanying opinions discourse at length on the possible nexus of obscenity and antisocial behavior, in the last analysis they do not depend on a showing or assumption of antisocial activity, but rather reflect a judicial conception that the law may give sanctions to the community's effort to avoid degradation of its quality of life and imposition on the privacy of others. See *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 59 (1973), referring to the view of Professor Alexander Bickel.

given to the term "indecent" in the FCC's opinion and order.

Mr. George Carlin is a comedian of stature, and a social satirist, but it is in the nature of social satirists to be provocative. He himself delivered his words as a biting commentary on what could *not* be heard on radio-TV, but he delivered them in a theater. A mature audience might appreciate not only the particular paradox, but the ongoing dilemma that every society has special vocabularies appropriate only for special groups, times and places. What the licensee did here was to broadcast them broadside, in houses and elsewhere; and to present the persistent, almost lavishly loving reiteration of the special words in an afternoon broadcast when children were likely in the audience. I cannot fault the FCC's order declaring that broadcast as indecent under 18 U.S.C. § 1464. TV-radio broadcasting has special access to the home, and home audiences are a primary target of the industry. In the home special considerations apply, with freedom from unwanted intrusion both by the government, *Stanley* v. *Georgia,* 394 U.S. 557 (1969), and by others presenting unwanted materials, *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

A concept like "indecent" is not verifiable as a concept of hard science. Its acceptance by and application by the FCC does not necessarily reflect, or depend upon, a determination by the FCC that this material would be dangerous to the children. What it reflects is a determination concerning a broad consensus of society, the view that the great bulk of families would consider it potentially dangerous to their children, and the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice. With the pervasiveness of TV-radio and its reach into the home the choice

made by broadcasters precludes an effective choice by the family.

Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), there was a showing of a film in a drive-in theater, at night. Any children in the audience were not being reached at home. They had access only if, having been excluded from the theater, they sought out the film from a non-contemplated location. *Cohen* v. *California,* 403 U.S. 15 (1971), was a case of emphatic political speech, the otherwise offensive protest occurred in the courthouse, basically an adult locale, open only during the day. The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception—a mere click, without current purchase. Indeed there is passivity after the click, with TV-radio stations being frequently left to a dial position previously set, unless there is an "alert" of some kind.

III

A crucial reality, dominating the case at hand, is the widespread access of radio to children. Radio is relatively inexpensive in initial capital cost, and virtually a free good in terms of operating expense. Widespread freedom of selection of programs by children is not only a condition, it is often a necessity. Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsuper-

vised during the day.[6] In this totality of conditions, one cannot waive away the radio-TV problem on the ground that the (mature) person can readily switch the channel.

It is no objection to the validity of the Commission's declaratory order that its protection will not be complete. It is likely that children will hear these words somehow, somewhere, and even at a relatively early age, but it makes a difference whether they hear them in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability.

It is argued that the FCC's order is meaningless, because many children listen to TV-radio unsupervised even late at night. A ban would not be proved invalid by a showing that in some homes the parents habitually use such language in front of their children. Similarly, a daytime ban is not invalid because some parents give their children freedom in late hours. That does not show the ruling is futile, for it may still provide protection to a large part of the households of America. Nor is it sound to say that partial control must logically end in total prohibition, at all times and for all audiences. Licensees have the ability to make time distinctions. *See* In re *Pacifica Foundation,* 36 F.C.C. 147, 149 (1964) (noting that "Pacifica took into account the nature of the broad-

[6] Smithsonian, Feb. 1977, p. 13 (noting that "most kids are latchkey children"). *See also* N.Y. Times, Feb. 10, 1977, at 39, col. 3 (City ed). The most recent data appear in Bureau of the Census, Dep't of Commerce, *Marital Status and Living Arrangements: March 1976*, Series P-20 No. 306, at 7 (January 1977): "Eighty percent of the children under 18 years old in 1976 lived in families with both of their parents present, a decline from 85 percent in 1970." *See also* U.S. Dep't of Labor, *News Release* (February 25, 1977) (majority of children between ages 6 and 17 have mothers in the labor force).

cast medium when it scheduled [programs with sexual themes or indecent language] for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum").

The abhorrence of Censorship is a vital part of our society. But there is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to First Amendment protection is not necessarily entitled to First Amendment protection in all places. *Young* v. *American Mini Theatres, Inc.,* 96 S. Ct. 2440 (1976). Nor is it necessarily entitled to such protection at all times.

Commissioner Robinson's apt citation of Justice Holmes[7] is rightly conjoined with a caution against the Ringing Phrase. We must beware of the distortion of doctrines and concepts that are pushed to extremes. In affirming the FCC's order, we would not be condoning a censorship that put the message of Mr. George Carlin off the air.[8] We would be authorizing reasonable steps that permit that message to find an audience, without pasting it on the youth. They

[7] *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908). ("All rights tend to declare themselves absolute to their logical extreme.")

[8] Moreover, it seems to me implicit in the Commission's order prohibiting the language "as broadcast" that the Commission does not intend to ban from the afternoon air waves every work of literature which contains one of these words. The monologue broadcast here was an exploration of obscenity, "with the words repeated over and over." FCC Conclusion at ¶ 14. It was very different from the plays of Shakespeare or the novels of Fielding, which may occasionally include, in the course of dealing with some larger theme, a word customarily indecent, and would be so regarded if not redeemed by the literary, artistic, political, or scientific context.

are impressionable, and likely to savor and repeat what they hear of the forbidden, without the maturity to distinguish between the different vocabularies and mindsets that every society harbors for different times and places.

Smut may drive itself from the market, and confound Gresham. So Judge Tamm suggests. Judges cannot, however, premise that there is not really a market that will endure.[9] In any event, there is a problem of the transition period. Even the most earnest advocates of freedom accept the role of government in protecting those who lack capacity.

IV

It is appropriate to acknowledge some inexactness in the agency's approach, and to say that this is an abiding discomfort but not a brand of invalidity. Vagueness is to some extent inherent in the subject matter, and is heightened by a procedure, of rulings in particular instances, that presents problems but also has virtues. The Supreme Court's long struggle with obscenity cases reflects the underlying complexi-

[9] The British Broadcasting Corporation experience cited by Judge Tamm (at p. 18) may not be transportable. The British began with commercial domination of the airwaves, and recoiled from its excess to develop BBC as a government agency, with a tradition of independence from the executive, that would operate in the public interest without the need for operating profits. The United States began with government operation of airwaves, which Herbert Hoover resolved should never be captured by commercial interests. But it later determined to permit radio (and later TV) broadcasting to draw on the energy of private enterprise—and that prime mover demands the spark of private profit. Whatever pornography's claim to constitutional protection, its basic reason for existence is to make money in the market. And if some publishers or broadcasters are engaged in disseminating the interdicted as a matter of principle, then the disapproval of the majority will not be a barrier, and might even be a spur.

ties, and those cases involved criminal sanctions. Nor is regulation of indecency precluded by the administrative agency setting. *Miller* has language that features the value of a finding by a jury representing the community. Yet *Miller's* continuation of an obscenity exception to freedom of press has been approved in other cases where there was no criminal prosecution and no jury.[10] I see no constitutional impediment either to an agency determination in the first instance, or to its use of an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review.

In the case of the Federal Communications Commission, there can be judicial review of any obscenity-indecency ruling at the instance of those who want to see and hear the material even if the licensee is ready to drop the matter. *Illinois Citizens Committee for Broadcasting* v. *FCC,* 169 U.S. App. D.C. 166, 515 F. 2d 397 (1974). Judicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific values.[11] The court would further guarantee that any determination of obscenity or indecency reflects the "hard look" by the agency appropriate where broadcast freedom and choice is limited.[12] Finally the court would require that the agency fully respect the licens-

[10] *United States* v. *Twelve 200 Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Star* v. *Preller*, 419 U.S. 955, *aff'ng mem* 375 F. Supp. 1093 (D.Md. 1974) (3-judge court).

[11] I would explicitly add "educational" values, see H. Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 ABAJ 1261, 1264 (1973).

[12] *WAIT Radio* v. *FCC*, 148 U.S. App. D.C. 179, 459 F. 2d 1203, *cert. denied*, 409 U.S. 1027 (1972); *Greater Boston TV Corp.* v. *FCC*, 143 U.S. App. D.C. 383, 444, F. 2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

ee's range of discretion, and not disapprove the licensee's action merely because the agency had a different view of the matter, but only because the licensee had gone so far as to be marked for an abuse of his license.[13]

V

What we have before us is the Federal Communications Commission order declaring the invalidity of particular language "as broadcast." That carries with it the limitations of time and deliberate repetition identified by the FCC.

The limitation of time is the *afternoon*. I am aware that the FCC's only indication of acceptability for the broadcast referred to the late hours of the evening.[14] But the issue of what might be broadcastable in the early evening is not before us, and raises different considerations. That would be a time when there were large numbers of children in home audiences generally, but the issue could be raised that for homes where parents really care about such matters there would be

[13] *Straus Communications, Inc.* v. *FCC*, 174 U.S. App. D.C. 149, 530 F. 2d 1001 (1976); *National Broadcasting Co.* v. *FCC*, 170 U.S. App. D.C. 173, 516 F. 2d 1101 (1975); *cert. denied*, 424 U.S. 910 (1975). Compare *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring: "I know it when I see it * * *").

[14] In addition to the reference in ¶ 16, quoted in the first footnote of this dissent, there is also paragraph 12, preceding the conclusion, as follows:

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivable be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller* v. *California*, *supra*.

at least one parent in a position to monitor the material heard and seen. A ruling expanding the zone of the broadcastable to adult levels might apply when the time of broadcast is such that the great preponderance of children are subject to parental control.

Under *Miller* matter is not "obscene" if it has literary, educational, artistic, political or scientific value, and accordingly is not "indecent" (under a *Miller*-analogue test) if it has such value. But the fact that it has such value for adults does not mean it has such value in a broadcast geared to children—or in a broadcast where a substantial number of children are likely to be in the audience without parental supervision.[15] A different question arises as to whether it may have such value for a broadcast during evening hours when children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children. Such a program may have serious literary, artistic, political or scientific value for its audience—assuming the exclusion from the audience (due to opportunity for parental control) of most of the children who by disposition, training or understanding will be dominated by the blunt impact of the sexual and excretory words, and for whom the serious content will be non-existent.

There are certain aspects in which the FCC's order may be subject to particular question—both as to

[15] In *Ginsberg* v. *New York*, 390 U.S. 629 (1968) the Court upheld a state law providing distribution to minors under 17 of material not obscene for adults. Justice Brennan's majority opinion holds the legislation could properly support parents in their discharge of their primary responsibility for children's well-being, including the assessment of sex-related material "according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.'" *See* 390 U.S. at 639.

words interdicted [16] and as to the duration of the time span.[17] Those are not the objections to the order that were preserved for this court. I would reserve those for another time—as calling for a modification of the FCC order, on objections duly presented, but not an all-out condemnation.

VI

As a judge of what the Constitution calls an "inferior" court, my duty is to apply *Miller* unless and until the Supreme Court modifies it. Given the independence of a legal commentator (see note 11), I have voiced my gravest doubts concerning the vitality of *Miller's* effort to resolve the "intractable" question of obscenity. But even my personal approach would let freedom ring with some muffle of time and place as a constitutional tradeoff—to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and

[16] If the case had been presented from the start in a different way, I would have remanded for further consideration, to make the rulings and standards more specific in order to provide more information for other licensees, which is the FCC's purpose. For one thing, I am not clear why the word "tit" is in the FCC's Index, because it is neither a sexual nor excretory organ. The fact that Mr. Carlin included it in his list of the verboten does not mean that the FCC must adopt his position. But I do not think there is any material legal objection to the ruling sustaining the complaint against petitioner, on the basis of its broadcast.

[17] Chief Judge Bazelon offers the thought that children are not home at 2 p.m. (page 2 n.2). That is *not* the objection put before the FCC or argued on appeal. That objection would merit proof and agency reflection—on such matters as exposure of preschool age children, whether schools in the area served by the station let some children out before 2 p.m., etc. In this record, issue was not joined with the FCC's finding that 2 p.m. was a time when children were "undoubtedly in the audience." (Par. 14, quoted in note 1 of this dissent).

to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishiness, but reflects a value that Alexander Bickel identified (see note 5, *supra*) as society's concern with the quality of its community life. As for children, even assuming that children's exposure to pornography is an inevitable as pornography itself, there is protection in disapproval, in the child's knowledge that the pornography that is seen and heard is not approved by parents or society.[18] That much of a tradeoff is likely to persist under *Miller*, even if that decision is modified. It leads me to affirm the FCC's effort to apply *Miller* in the context of daytime broadcasting—when the protection of children is a compelling state interest.[19] I respectfully dissent.

[18] Compare the position of Professor Willard Gaylin, professor of psychiatry and law at Columbia University, presented in *The Prickly Problems of Pornography, Book Review of Kuh, Foolish Fig Leaves?* 77 Yale L.J. 579, 594 (1968):

"The child is protected in his reading of pornography by the knowledge that it is pornographic, that is, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement.

"If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego. The law is an instrument in the establishment of social behavior—and in the judging of it."

The foregoing was quoted in Justice Brennan's majority opinion in *Ginsberg* v. *New York*, 390 U.S. 629 at 642. When restating it recently, Professor Gaylin added: "The law, more than most lawyers seem to realize, is an ethical determinant and a moral force." W. Gaylin, *Obscenity*, Washington Post, Feb. 20, 1977, p. C–1.

[19] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U.S. App. D.C. 166, 174, 515 F. 2d 397, 405 (1975); *See Ginsberg* v. *New York*, 390 U.S. 629 (1968).

254-987—78——8

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu.

I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay. I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt,

cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the work cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock is in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man, (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit, oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause, (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy, I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that. (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit. (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter). He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had

a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in a Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh, (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuc*k*. (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh,

we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love, (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you, (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list, I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no

problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat? Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. As, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can stay, stuff it! (murmur) There are certain things you can say it's weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight, and thank you also. (clapping, whistling)"

United States Court of Appeals
for the District of Columbia Circuit

September Term 1976

No. 75–1391

[Filed March 16, 1977, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communication Commission

Before: BAZELON, Chief Judge, TAMM and LEVENTHAL, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Communications Commission under review is hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 16, 1977.

Opinion filed by Circuit Judge Tamm.
Concurring opinion filed by Chief Judge Bazelon.
Dissenting opinion filed by Circuit Judge Leventhal.

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Before: BAZELON, Chief Judge; TAMM and
LEVENTHAL, Circuit Judges

Order

Upon consideration of the petition for rehearing filed by respondents Federal Communications Commission and United States of America, it is

ORDERED by the Court that respondents' aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge *Leventhal* would grant respondents' petition for rehearing.

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Before: BAZELON, Chief Judge; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

Order

Upon consideration of the suggestion for rehearing *en banc* of respondents Federal Communications Commission and United States of America, and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc,* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

Circuit Judges *Leventhal, MacKinnon, Robb* and *Wilkey* would grant respondents' suggestion for rehearing *en banc.*

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION, *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FEDERAL COMMUNICATIONS COMMISSION,
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v.

PACIFICA FOUNDATION, *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case involves the narrow question as to whether the Federal Communications Commission (the "Commission") has the authority to proscribe the broadcast, in any context, of specific words solely on the grounds that they are generally regarded as offensive. The United States Court of Appeals for the District of Columbia Circuit ruled in the Opinion below (Pet.

App. A) that the Commission does not have such authority. The factual context in which this question is presented is summarized briefly below.

On February 22, 1975, the Commission released a *Declaratory Order and Memorandum Opinion and Order in the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM)* ("Order") (Pet. App. B) wherein it declared certain words to be "indecent" within the meaning of that term as used in Section 1464 of the United States Criminal Code (18 U.S.C. Section 1474). (Pet. App. B at 70-72, ¶¶ 11, 12 & 14). The Order construed "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. . . ." (Pet. App. B at 70-71, ¶ 11). The Commission emphasized that "indecent language," as defined in the Order,

> is distinguished from obscene language in that it (1) lacks the element of appeal to prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(Pet. App. B at 71, ¶ 11). The Order explicitly forbade the broadcast in any context of seven specific words [1] and, thus, created an *Index Verborum Prohibitorum*. The Order further declared that the broad-

[1] The seven words used in the Carlin monologue which, according to the Commission, "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television," are set forth at paragraph 14 of the Order. (Pet. App. B at 72).

cast of such language during times of the day when children may reasonably be expected to be in the audience constitutes a *per se* violation of the Criminal Code and is *per se* contrary to the public interest. (Pet. App. B at 70-71, 72-73, & 73-74, ¶¶ 11, 14, & 16). The Order also suggested that, should a licensee broadcast language of the sort encompassed by the Commission's definition of "indecent" during late evening time periods "when the number of children in the audience is reduced to a minimum," the Commission "might conceivably" consider whether material containing "indecent" language "has serious literary, artistic, political or scientific value" in determining whether the broadcast was in violation of Section 1464 or was contrary to the public interest (Pet. App. B at 71, 73-74, ¶¶ 12, 16); [2] however, the Order left this matter in a state of limbo.

The Order was issued in response to a citizen's complaint concerning particular material broadcast over noncommercial educational FM Station WBAI, New York, New York, which is licensed to the Respondent herein, Pacifica Foundation ("Pacifica"). The material complained of was a selection entitled "Filthy Words" from the record album "George Carlin Occupation: Foole," which was recorded before a live audience at the Circle Theatre, San Carlos, California. This selection was broadcast over WBAI at approximately 2:00 p.m. on a weekday afternoon during the concluding portion of "Lunchpail," a regularly scheduled live program. The subject of "Lunchpail" on the day the

[2] Under the Commission's formulation of the elements which constitute "indecency," there is no need of showing appeal to prurient interest whether the audience be composed of adults or children.

selection was broadcast had been contemporary attitudes towards the use of language and the program's host had presented his own commentary and analysis regarding this topic and discussed the matter by telephone with listeners. The host played the selection "Filthy Words" at the conclusion of the program because he regarded it as an "incisive satirical view of the subject under discussion." The selection uses a number of words which are undeniably regarded as offensive by many people, and the complaint was directed at the broadcast of these words which the complainant characterized as "garbage."

Pacifica sought review of the Order, invoking the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. Section 402(a) and 28 U.S.C. Section 2342. The court below held that the Order contravened Section 326 of the Communications Act which prohibits the Commission from censoring radio communications since the Order was overbroad and vague, and the court set aside the Order on this narrow ground. It is this action of the court below which is at issue in this case.

ARGUMENT

The court below was clearly correct in its ruling that the Commission's Order was invalid in that it was overbroad and vague and thus contravened Section 326 of the Communications Act. Moreover, the opinion does not raise any substantial question of federal law concerning the Commission's regulatory authority. Finally, the opinion below in no way creates a conflict with the decisions of any other court of appeals or of this Court. Accordingly, review by this Court is not warranted.

I. The Decision Below Was Clearly Correct.

The court below was clearly correct in its ruling that the Commission's Order was invalid in that it was overbroad and vague and thus in contravention of Section 326 of the Communications Act.

The Commission's Order is fundamentally overbroad in both scope and effect and thereby is contrary to the anti-censorship provisions of Section 326. The Order refers to patently offensive language which describes sexual or excretory activities and organs. (Pet. App. B at 70-71, 72-73, ¶¶ 11, 12 & 14). It is clear, however, that the sweep of the Order is much broader. Under the Commission's definition of "indecent" any and all uses of certain words which in their origin or some of their applications refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such a word, as actually used in context, described a sexual or excretory activity or organ or whether it is used colloquially in a context where it cannot conceivably be construed as describing or even referring to sex or excretion. If one of the common usages of a given word is as a synonym for a sexual organ or an excretory function, and if the word is also generally regarded as "patently offensive," the Order declares that the broadcast of such a word is *per se* a crime and is *per se* contrary to the public interest regardless of whether the use of the word causes, or could reasonably be expected to cause, injury or harm to any listener, and regardless of whether the word is used in the context of a program which has substantial literary, artistic, political or scientific value.[3] Such

[3] The Commission's definition of "indecent" language that it maintains can be barred from broadcast over the media is substantially overbroad under *Miller* v. *California*, 413 U.S. 15 *rehearing*

a ban on words *qua* words contravenes the basic principle that offensive words or ideas may be proscribed only where they are presented in such a context as to constitute a direct threat to some substantial societal interest and that protection of the public from offensive words or ideas does not itself constitute such a substantial societal interest.[4]

The Commission's action was predicated largely upon its belief that certain words can be banned, absolutely, from the airwaves without limiting or inhibiting in any way the free expression in the broadcast medium which is protected from governmental interference by the First Amendment and Section 326 of

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denied, 414 U.S. 81 (1973). Moreover, the Commission's definition of "indecent" is inherently boundless. Not only does the definition itself fail to present a readily ascertainable general principle for distinguishing the seven words used in the Carlin monologue from other offensive words, but once there is acceptance of the rationale of protecting the sensibilities of the public which underlies the Commission's action, there is no readily ascertainable principle which would prevent the Commission from protecting the public's sensibilities from any other forms of expression which might offend. *See also Cohen* v. *California*, 403 U.S. 15 (1971).

[4] *See e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Miller* v. *California*, 413 U.S. 15 (1973); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Roth* v. *United States*, 354 U.S. 476 (1957); *Dennis* v. *United States*, 341 U.S. 494 (1951); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Tollet* v. *United States*, 485 F.2d 1087 (8th Cir. 1973); *Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960); *United States* v. *One Book Called "Ulysses,"* 72 F.2d 705 (2d Cir. 1934).

the Communications Act. The Commission contends that its Order "is not intended to stifle robust, free debate on any controversial issues confronting our society" or "to modify [its] previous decisions recognizing broadcasters' broad discretion in programming ideas." (Pet. App. B at 67-68, 73-74, ¶¶ 7, 16).

However, the direct effect of the Commission's Order is to proscribe the broadcast of the seven words referred to in the Carlin monologue as "the ones you couldn't say on the public airwaves," and all similarly offensive words, irrespective of the context in which they are broadcast. It is clear that the words prohibited by the Order may often be presented in the context of a program having literary, artistic, social, or political value and thus, the broadcast itself would be in the public interest.[5] Yet, the Commission's ban, as promulgated, would clearly sweep so broadly as to prohibit the broadcast of such programming.[6]

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[5] As recognized by the court below, some illustrative examples of material banned from the air by the Order would include the works of Shakespeare, Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and even the Bible. (Pet. App. A at 15).

[6] In its Order, the Commission relies upon an *atavistic* conception of the scope of governmental authority to regulate expression which has not been recognized by any federal court since Judge Learned Hand exposed its inherent incompatability with the principles of the First Amendment in *United States* v. *One Book Called "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934). In that case, Judge Hand held that the obscene character of a work could not be determined by judging isolated passages lifted out of context, and he observed that to hold otherwise would permit the suppression of "much of the great works of literature." *Id.* at 708. Judge Hand's holding in *"Ulysses"* has been repeatedly ratified by the Court, *see, e.g. Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Miller* v. *California*, 413 U.S. 15 (1973); *Roth* v. *United States*, 354 U.S. 476 (1957).

The Commission's Order may also be seen as overbroad when examined from two other perspectives. First, the net effect of the Order ostensibly predicated on a desire to protect children, is to limit the adult population to only such programming as is fit for children. This is a classic example of overbreadth. *Butler* v. *Michigan,* 352 U.S. 380 (1957); *United States* v. *Pellegrino,* 467 F. 2d 41 (9th Cir. 1972); *United States* v. *Levine,* 83 F. 2d 156 (2d Cir. 1936). Second, implicit in the Order, is the notion that *every* use of these seven banned words will be deemed offensive as to minors. It strains credulity to assume that these words will be offensive even as to minors in every conceivable context in which they could be presented. In this regard, it is manifest that the Order is overbroad. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

Additionally, the Court below correctly found that the Order is defective on the grounds of vagueness. As the Commission itself states, it "shaped its Order" to further the "special societal interest in protecting young children from sexually explicit materials." (Pet. at 14). However, the Order is so vague that it even fails to define the term "children."[7] This Court has held that in evaluating the requisite capacity of individual choice that the actual age of the individual minor is a significant factor to be considered.[8] Yet as emphasized by the court below, the "Order does not even consider age as a factor, much less a significant one." (Pet. App. A at 15).

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[7] The fact that a statute is intended to protect minors, by itself, is not sufficient to justify a statute which is otherwise unconstitutionally vague. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968).

[8] *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

Moreover, in an attempt to save itself from a successful challenge on the grounds of overbreadth,[9] the Order provides that it is possible that the ban may not be applied at all times; during the late night-time hours, the Order states that "a different standard *might conceivably be used.*" (Pet. App. B at 71, ¶ 12) (emphasis added). However, the Order fails to specify at what time the number of children comprising the listening audience will be sufficiently low as to permit use of a more relaxed standard. It is clear that this inherent vagueness supports invalidation and not affirmation of the Order.

II. There Is No Important Question of Federal Law

The Commission's Petition does not raise any issue worthy of certiorari.[10] The opinion below held only that the Commission's Order was overbroad and vague in violation of the anti-censorship provision of 47 U.S.C. Section 326. (Pet. App. A at 2, 13, 18, 19-20). Notwithstanding this narrow holding, the Commission contends that the following important questions of federal law are presented by the decision:

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[9] As recognized by Chief Judge Bazelon, "protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep," since the Order "bans indecent speech whenever it is 'reasonably likely' that children will be in the audience, which is all but the late night hours." (Pet. App. A at 29-30, n. 20, *citing, Young* v. *American Mini Theatres,* 427 U.S. 50, 76-78 (1976) (Powell, J. concurring)).

[10] Of great significance in this regard is the fact that the United States Department of Justice which shares concurrent authority and responsibility with the Commission with respect to the enforcement of Section 1464 of the Crimina Code has decided neither to seek certiorari on its own nor to support the Commission's Petition for Certiorari in this case. *Cf. FCC* v. *American Broadcasting Co., Inc.,* 347 U.S. 284 (1954).

1. Whether the broadcast medium's unique qualities and the requirement that broadcasters program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory action, to the prohibition of indecency in 18 U.S.C. § 1464 at times when there is a strong probability that unsupervised children are in the audience.

2. Whether the FCC correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464.

As will be demonstrated in the discussion that follows, neither of these questions is properly presented by this case.

The court below did not even reach the first question posed by the Commission. Indeed, the court expressly stated that it was *not* "deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected. . . ." (Pet. App. A at 2). Rather, the majority opinion merely held that the challenged ruling was overbroad and vague and thus carried the Commission "beyond protection of the public interest into the forbidden realm of censorship." (Pet. App. A at 2). In reaching this conclusion, the court below noted the Commission's contention that in order to carry out its duties to promote the use of radio and television communications in the public interest, it enjoys an exception from the requirements of the First Amendment and that "[t]he basis of this claim is that the broadcast medium is unique." (Pet. App. A at 13). However, the court found that, in order to decide this

case, it was not necessary to resolve the issue as to whether the unique qualities of broadcasting create an exception to the First Amendment as claimed by the Commission. The court assumed for the purposes of this case "that the FCC has the power to prohibit non-obscene speech from being broadcast . . .," and it held that notwithstanding this power, the Commission's Order was an invalid exercise of such power because it was overbroad and vague. (Pet. App. A at 13 & 18).[11]

Notwithstanding the limited nature and scope of the holding of the court below, the Commission contends that the decision below, "establish[es] that only hard core pornography falling within the definition of *Miller* v. *California,* 413 U.S. 15 (1973) may be barred from broadcasting over the nation's air waves by Section 1464" and that "such a proposition should not be finally established for the entire nation's broadcast medium until this Court has had a full opportunity to consider" whether the "unique qualities" of broadcasting alluded to in the Commission's Order give the Commission authority to adopt a definition of "indecency" which is substantively different from the *Miller*

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[11] No credence can be given to the Commission's contention that the opinion below operates to curtail its authority to regulate non-obscene speech thereby raising a substantial federal question. In support of this proposition the Commission has made reference to a wholly unrelated case, *The Trustees of the University of Pennsylvania,* FCC 75-1333, December 4, 1975, (Pet. at 10), which is still being prosecuted by the Commission. However, that case clearly demonstrates that the Commission, notwithstanding the *Pacifica* decision, perceives that it has the authority to regulate non-obscene speech, continues to act as if it has such authority, and in no way feels itself constrained or limited by the lower court's *Pacifica* decision. Thus, its contention that an important issue of federal law arises with respect to such authority, is wholly contrary to its present practices in prosecuting cases involving non-obscene speech.

definition of "obscenity" for the purposes of enforcement of Section 1464. (Pet. at 8). There is clearly no merit to this contention. As recognized by the Commission in its statement of the case (Pet. at 7), the court below did not find it necessary to decide "the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected" (Pet. App. A at 2) and the court left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium.[12] Accordingly, since the question posed in the Commission's Petition as to the extent of its authority to construe the term "indecent" as used in Section 1464 as having a meaning different from the term "obscene" was not considered, let alone resolved, by the court below, this question is clearly not now ripe for review by this Court.

The second question raised by the Commission's Petition is "[w]hether the FCC correctly found that language [*as*] *broadcast* in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464." (Pet. at 2) (emphasis added). This question is not presented by the Commis-

[12] In view of the care which the court below took to make clear that it was *not* deciding the question as to whether the terms "indecent" and "obscene" have different meanings for the purposes of applying 18 U.S.C. § 1464 to broadcasting, *United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977), a case which involved interpretation of the terms "indecent" and "obscene" as used in § 1464 in a *non-broadcast* context, cannot possibly have the effect which the Commission attributes to it of transmuting the decision below into a decision which "establish[es] that only hard core pornography falling within the definition of *Miller* v. *California* . . . may be barred from broadcasting."

sion's Order and was not considered by the court below. It is, thus, not properly before this Court.

The Commission's Order did not merely hold that the words used in the Carlin monologue were "indecent as broadcast." Rather, the Order was issued because it was the Commission's judgment that such a procedure was "admirably suited" both to terminate the controversy raised by the specific complaint concerning the broadcast of the Carlin monologue over WBAI, and "to clarify the standard, which the Commission utilized to judge 'indecent language.'" (Pet. App. B at 73, ¶ 15). Thus, the Commission specifically "adopted a legislative type rule which it then applied to the facts of the case," (Pet. App. A at 19-20, n. 2 (Bazelon, C.J. concurring)) instead of merely considering the words "as broadcast." The effect of the Order, as pointed out by the court below, was to "sweepingly [forbid] any broadcast of the seven words irrespective of context or however innocent or educational they may be . . . ." (Pet. App. A at 14-15). It is, thus, clear that the Order was not limited to the words "as broadcast" and that the court below was not called upon to consider, and did not reach, the question posed in the Commission's Petition as to whether the words used in the Carlin monologue were "indecent as broadcast."

III. There Is No Conflict of Decision

The Commission maintains that this Court should grant a writ of certiorari "because the questions presented by this case require a reconciliation of conflicting constitutional interests . . . ." (Pet. at 7-8). There is clearly no merit to this contention. Quite to the con-

trary, as discussed above, the issue in the present case, as considered by the court below, is narrowly drawn and no amount of strained semantics can convert it into one warranting review by this Court whether on the basis of "importance" or on the basis of "conflict between decisions." Simply stated, there is no conflict between decisions resulting from the majority opinion. The court below did not render a decision in conflict with the decision of any other court of appeals on the same matter, nor did it decide a federal question in a way in conflict with applicable decisions of this Court."

Notwithstanding the fact that it is unable to demonstrate that this case properly comes within either of the foregoing recognized and legitimate standards for the grant of certiorari, the Commission contends that this Court should grant certiorari because of "conflicting constitutional interests" resulting from the lower court's opinion. This argument must fail first, because the foregoing concept of "conflicting constitutional *interests*" (emphasis added) is one *not* recognized by the Court as a legitimate standard for certiorari, and second, because as previously noted, the decision below is in no sense a constitutional holding.

Moreover, even assuming arguendo, first, that the standard proferred by the Commission would be accepted by this Court as a legitimate basis for the grant of certiorari, and second, that there is such a "conflict of constitutional interests" under the facts presented, it is well recognized that, if it appears upon consideration of a petition for certiorari that the case can be decided on another ground, thus making it unneces-

[13] Sup. Ct. R. 19.

sary to reach the issue which is claimed to involve a conflict, the presence of the conflict, standing alone, will not constitute a sufficient reason for granting review. See *Sanson Hosiery Mills* v. *N.L.R.B.*, 344 U.S. 863 (1952); *The Arlington, Inc.* v. *Mayer*, 339 U.S. 965 (1950). Clearly, the present case can properly be resolved on the basis of the correctness of the lower court's sole determination that the Commission's Order was vague and overbroad in contravention of Section 326.

Accordingly, the Commission's contention that this case involves a "conflict" worthy of the grant of certiorari is wholly devoid of merit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 77-528

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

The Federal Communications Commission has asked this Court to grant its petition for a writ of certiorari so that the Court may resolve a federal question of paramount importance to the Commission, broadcast licensees and the public as viewer and listener. (Pet., p. 8.) In the decision reversed by the court of appeals, the Commission had sought to give meaning, for purposes of regulatory action, to the word "indecent" as it appears in a statute of Congress barring the utterance of "obscene, indecent, or profane language by means of radio communications * * *." 18 U.S.C. § 1464. Acting on a listener's complaint, the Commission had found that the deliberate broadcast in the early afternoon of a pre-recorded 12-minute comedy

monologue devoted almost entirely to the use of certain "filthy words" was indecent and subject to regulatory sanctions.[1] (Pet. App., pp. 63–92.) The Commission replies only to correct two erroneous impressions the respondent's opposition may have created and to restate briefly the reasons for granting the writ. Otherwise, the Commission rests on its petition and urges the Court to give particular attention to the dissenting opinion of Judge Leventhal in the court below. (Pet. App., pp. 43–57.)

1. The Pacifica Foundation, licensee of the station involved in this case and respondent in this Court, states in its opposition that the Commission had declared its broadcast of certain words to be a "violation of the Criminal Code" (Opp., p. 3) and to be "*per se* a crime" (Opp., p. 5). In fact, the Commission has neither the authority nor the inclination to conduct criminal proceedings leading to conviction and the imposition of criminal sanctions.[2] The Commission addressed the Pacifica matter solely as an exercise of its regulatory responsibility under Sections 312 and 503 of the Communications Act, 47 U.S.C. §§ 312 and 503, to require its licensee to respect the congressional prohibition against obscene and indecent language.[3] The FCC has not usurped the criminal jurisdiction of the courts, as Pacifica appears to suggest, and has not convicted Pacifica of a crime.

2. Pacifica also argues that the court of appeals was correct in not considering whether the language was indecent "as broadcast" because the FCC's order went beyond the particular

[1] 47 U.S.C. §§ 312(a)(6), 312(b)(2), 503(b)(1)(E). Although the Commission did not impose sanctions in this instance, it found that the material "as broadcast" was indecent. (Pet. App., p. 72.)

[2] In the analogous area of regulatory enforcement of the criminal prohibition against broadcast of lottery information, the courts have recognized that the FCC does not function as a criminal court when it applies substantive criminal prohibitions through regulatory action. See *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 384 (S.D.N.Y. 1953), *aff'd*, 374 U.S. 284, 296 (1954).

[3] The Second Circuit has held that Section 312 imposes on the FCC "the duty to enforce" congressional policies embodied in criminal statutes and incorporated by reference into the regulatory Act. *New York State Broadcasters Ass'n* v. *United States*, 412 F. 2d 990, 995–97 (1969), *cert. denied*, 396 U.S. 1061 (1970).

case and established standards for judging whether broadcast material is indecent. (Opp., pp. 12–13.)[4] In fact, the Commission specifically limited its holding to the language "as broadcast" (Pet. App., p. 72), while taking the opportunity to issue a declaratory order for the guidance of the public and broadcast licensees. The Commission surely intended its order to provide guidance; but its holding extended only to the comedy monologue and should have been reviewed in that context. As Judge Leventhal pointed out in dissent, there is no constitutional impediment to an agency addressing such matters in the fashion of courts, "disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (Pet. App., p. 53.) Both of the opinions below which reversed the FCC's decision failed to review the matter as one disposing of a particular case. As a result, both opinions broadly disabled the Commission to perform its statutory duty to take regulatory action against indecent broadcast material.[5]

3. The Commission urges grant of the writ because this case involves a federal question of paramount importance that should be resolved by this Court. Whether the question is

[4] Pacifica cites language from the concurring opinion of Chief Judge Bazelon in support of this position. (Opp., p. 13.) The opinion of Judge Tamm did not address the question whether the language "as broadcast" was indecent, but found that the standard for general application was overbroad. (Pet. App., pp. 7–18.) Judge Leventhal, in dissent, correctly reviewed only the Commission's holding that "the language as broadcast was indecent" (Pet. App., p. 45), and affirmed that holding without considering what the FCC might do in other circumstances that were not before it in this case and consequently were not before the court for review.

[5] See also, *United States* v. *Simpson*, 561 F. 2d 53, 60 (7th Cir. 1977), holding that "obscene" and "indecent" in Section 1464 "are to be read as a single proscription * * *." Although Pacifica is technically correct in stating that *Simpson* involved an application of Section 1464 "in a *non-broadcast* context" (Opp., p. 12n.12), the distinction between non-broadcast uses of radio and broadcast station operation would appear to make no difference for purposes of applying Section 1464. The effect of the decisions in *Simpson* and *Pacifica* is to erase the prohibition of "indecent" language from Section 1464 regardless of the class of station the licensee uses.

viewed as statutory or constitutional,[6] it plainly is important to the millions of viewers and listeners who depend upon radio and television for a substantial part of their news and information, to the licensees who operate radio and television stations,[7] and to the agency which regulates the licensees under the statutes in question.

As Judge Leventhal recognized, the Commission tried in its order to define "indecent" in terms of the considerations which have guided this Court's most recent decisions in the obscenity area:

> In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling * * *, save for an adaptation to bridge the difference posed by the characteristics of radio presentation.

(Pet. App., p. 47.) The particular characteristics of radio on which the Commission—and Judge Leventhal—relied are its intrusiveness and pervasiveness, its ready availability to children and unconsenting adults, the scarcity of frequencies and

[6] A close reading of the opinions below reveals that there is no statement of a majority rationale. Judge Tamm found that the Commission's order violated Section 326 of the Communications Act, 47 U.S.C. § 326, and did not reach the constitutional issue. Chief Judge Bazelon agreed only "with the result reached by Judge Tamm" (Pet. App., p. 19), found that analysis of Section 326 did not "end the matter" (*id.*, p. 21), and rested his decision on the First Amendment (*id.*, pp. 19–42). Thus, it is no more accurate to state, as Pacifica does, that the holding was not constitutional (Opp., p. 14) than to assert, as the Commission does *not*, that the court of appeals made a constitutional ruling. Each judge in the majority apparently reached the same result for entirely different reasons. The character of the decision (constitutional or statutory) is not crucial, however, to this Court's consideration of petitions for writ of certiorari. If the case has decided "an important question of federal law which has not been, but should be, settled by this Court," the writ may be granted. Rule 19(1)(b) of the Rules of the Supreme Court.

[7] The Commission has assumed that licensees such as Pacifica, as well as viewers and listeners who might oppose the Commission's order, would benefit from authoritative resolution of the questions raised in this case. See *Eastern Educational Radio* (*WUHY-FM*), 24 FCC 2d 408, 415 (1970).

the consequent public obligations of licensees, and the potential for a flood of offensive material on the airwaves in the absence of regulation. This Court should decide whether those characteristics justify different standards for regulating speech in the area of obscenity and indecency.[8]

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the Court should grant the writ and decide this important federal question.

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[8] The Court already has found that the First Amendment has a different application in broadcasting for some purposes. *Compare Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), *with Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). The Court also has recognized that the First Amendment may impose variable standards where the "well-being of children" provides a countervailing consideration. *Ginsberg* v. *New York,* 390 U.S. 629, 634–45 (1968). Finally, the Court has held that a householder need not have his privacy disturbed by unwanted and objectionable material, and that he does not have to take the risk that offensive material will come into the hands of his children in their own home before it can be stopped. *Rowan* v. *Post Office Department,* 397 U.S. 728, 738 (1970).

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER
v.
PACIFICA FOUNDATION, RESPONDENT

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 9 (App. 45). The opinions of the Federal Communications Commission are reported at 56 FCC 2d 94 (App. 6) and 59 FCC 2d 892 (App. 41).

JURISDICTION

The court of appeals entered judgment on March 16, 1977 (App. 115), and denied a timely petition for rehearing on May 10, 1977 (App. 117). This Court granted the FCC's timely petition for a writ of certiorari on January 9, 1978, and has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTIONS PRESENTED

1. Whether the peculiar characteristics of the broadcast media and the requirement that broadcast licensees operate their stations consistently with the public interest justify the prohibition of "indecent" language as a separate category from "obscene" language, for purposes of regulatory action.

2. Whether the Federal Communications Commission acted lawfully and reasonably in finding a violation of the prohibition against "indecent" language where a licensee had deliberately and repetitiously broadcast words which describe sexual and excretory functions and organs in a manner that was patently offensive by contemporary community standards for the broadcast media, at a time when children were in the audience.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> The Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Section 1464 of Title 18 of the United States Code, 62 Stat. 769, 18 U.S.C. § 1464, provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Section 312(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 74 Stat. 889, provides:

> The Commission may revoke any station license or construction permit—
>
> * * *
>
> (6) for violation of section * * * 1464 of title 18 of the United States Code.

Section 312(b) of the Communications Act, as amended, 74 Stat. 889, provides:

> Where any person * * *
>
> (2) has violated or failed to observe any of the provisions of this Act, or section * * * 1464 of title 18 of the United States Code * * *, the Commission may order such person to cease and desist from such action.

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended by 62 Stat. 769, provides:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 503(b)(1) of the Communications Act, as amended, 74 Stat. 889, provides:

> Any licensee or permittee of a broadcast station who—
>
> * * *
>
> (E) violates section * * * 1464 of title 18 of the United States Code,
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such vio-

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lation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

STATEMENT

Radio station WBAI–FM broadcast a recorded comedy monologue which discussed and repeatedly uttered "the words you couldn't say on the public * * * airwaves." (App. 8–9, 19, 109.) A listener, who had heard the broadcast while driving with his young son, complained to the FCC, pointing out that the monologue had included the words "cocksucker," "cunt," "fuck" and "shit," and asking what the FCC intended to do about it. (App. 2–3.) After obtaining the station's response to the complaint, the Commission issued a declaratory order holding that certain words in the recorded monologue "as broadcast" were indecent because (1) the words described sexual and excretory functions and organs in a manner that was patently offensive by contemporary community standards for the broadcast media; (2) children were in the audience at the time of the broadcast; and (3) the station made the broadcast deliberately with knowledge of the repetitious use of offensive words in the pre-recorded monologue. (App. 16–17.)

A divided panel of the District of Columbia Circuit reversed the Commission's decision (App. 45), and this Court granted the Commission's petition for a writ of certiorari.

In this statement, we describe briefly the statutory and regulatory background in which the Commission

acted, and the pertinent facts of the Pacifica controversy, including the rulings of the FCC and the court of appeals.

A. *Statutory Prohibitions.* Section 1464 of the criminal code, 18 U.S.C. § 1464, prohibits the utterance of obscene, indecent or profane language by means of radio. The prohibition originated as part of Section 326 of the Communications Act, 47 U.S.C. § 326, and was shifted to the criminal code in 1948 as part of a comprehensive revision of federal criminal law.[1] As adopted by Congress in 1934, Section 326 stated:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.* 48 Stat. 1064, 1091 [emphasis added].

Thus, the prohibition of obscene and indecent language originally was part of the same statute that forbids the Commission to censor radio communications or to interfere with free speech by means of radio.

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[1] *Gagliardo* v. *United States*, 366 F. 2d 720, 723 (9th Cir. 1966). Section 326, in turn, had been derived from Section 29 of the Radio Act of 1927, 44 Stat. 1162, 1172.

Although 18 U.S.C. § 1464 authorizes criminal sanctions that may be imposed only after trial in a district court, the Commission has concurrent enforcement responsibilities with the Department of Justice.[2] The Commission has explicit statutory authority to revoke broadcast licenses, to issue cease and desist orders, and to impose money forfeitures for conduct which would be in violation of the substantive prohibitions of Section 1464. See 47 U.S.C. §§ 312 (a) and (b), 503(b)(1)(E). The Commission also may deny license renewal or grant a short-term renewal. 47 U.S.C. §§ 307, 308. Finally, the Commission has authority to issue declaratory orders, "with like effect as in the case of other orders," to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e). See also 47 C.F.R. § 1.2.

At the time of the Commission's declaratory order in this case, the federal courts that had addressed the matter had not construed "indecent" as subsumed in "obscene" for purposes of Section 1464. The Ninth Circuit, in *Gagliardo* v. *United States,* 366 F. 2d 720 (1966), had concluded that the district court should define "indecent" in the first instance, and had expressly declined to rule that there was no separate prohibition of "indecency" in the statute.[3] The Sev-

[2] *Cf. Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289 (1954).

[3] The Ninth Circuit rejected the argument that an earlier decision under the Radio Act, *Duncan* v. *United States*, 48 F. 2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931), had equated indecency with obscenity for purposes of the broadcast statute. 366 F. 2d at 725 n. 7.

enth Circuit in two recent cases had suggested that "obscene" and "indecent" had separate and distinct meanings in Section 1464. *Tallman* v. *United States,* 465 F. 2d 282 (1972); *United States* v. *Smith,* 467 F. 2d 1126 (1972). *Smith* had held that the district court, in any retrial, should define the words "profane" and "indecent" for the jury. 467 F. 2d at 1130.[4] See also *Illinois Citizens Committee* v. *Federal Communications Commission,* 515 F. 2d 397, 404 n. 14 (D.C. Cir. 1975), which did not decide whether there was a separate prohibition of "indecency" because it affirmed the Commission on the ground that the language was "obscene."

B. *FCC Regulation Under Section 1464.* Although broadcasters enjoy broad discretion in programming,[5] they also have special public responsibilities which derive both from their status as licensees under the public interest standard and from the peculiar charac-

[4] After the court of appeals had reversed the Commission in this case, the Seventh Circuit changed its reading of Section 1464 and held that the proscription of obscene and indecent language in that statute should be read as a single proscription. *United States* v. *Simpson*, 561 F. 2d 53 (7th Cir. 1977). Although it reversed the jury's finding that certain language was criminal under the "indecency" standard, the court said in a footnote that it "would have had no difficulty in affirming a finding that the language was obscene * * *." 561 F. 2d at 55 n. 1. The court also stated that the "balance between the speaker and listener must tip in favor of the listener" at some point, though it did not locate that point. *Id.* at 60 n. 8.

[5] *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973): *Cf. Farmers Union* v. *WDAY*, 360 U.S. 525 (1959).

teristics of the media.[6] As this Court has recognized, "the broadcast media pose unique and special problems not present in the traditional free speech case."[7] The "unusual order of First Amendment values" in the broadcasting context has required Congress, the agency and the courts to perform the difficult and delicate task of balancing "the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed * * *."[8]

In this context, it is not surprising that Congress has forbidden both censorship, 47 U.S.C. § 326, and the broadcast of obscene, indecent or profane language, 18 U.S.C. § 1464.[9] In respecting these apparently divergent commands by Congress, the Commission has walked a "tightrope" between saying too much about programming and saying so little as to abdicate its responsibility.[10]

Decisions renewing broadcast licenses in the face of serious complaints about "offensive" program-

[6] *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). See generally, *Programming Policy Statement*, 44 FCC 2303 (1960).

[7] *Columbia Broadcasting System*, 412 U.S. at 101.

[8] *Id.* at 101–02.

[9] Congress also has prohibited broadcasts of lottery information, 18 U.S.C. § 1304, and fraud by radio, 18 U.S.C. § 1343. Each of these prohibitions is enforceable through administrative action by the FCC as well as in criminal courts. 47 U.S.C. §§ 312 (a) and (b), 503(b)(1)(E).

[10] *Banzhaf* v. *Federal Communications Commission*, 405 F. 2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *Columbia Broadcasting System*, 412 U.S. at 105.

ming illustrate both the broad discretion conferred on licensees and the delicacy of the agency's balancing act.

The Commission in 1964 renewed the licenses of Pacifica, the respondent in this case, despite complaints alleging that the stations had carried "offensive" and "filthy" programs. The Commission agreed that the programs probably had offended some listeners.[11] But it declined to rule such programs off the air:

> [S]uch provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. * * * Pacifica's judgments as to the above programs clearly fall within the very great discretion which the act wisely vests in the licensee.

Pacifica Foundation, 36 FCC 147, 149 (1964). The Commission's decision in that case was reinforced by the fact that Pacifica had taken into account the nature of the broadcast medium by scheduling the programs in the late evening (after 10 p.m.) when the

[11] Over the three-year licensing period, Pacifica had aired some five programs that had prompted complaints about the use of swear words and discussion of such "sensitive" topics as homosexuality. *Pacifica Foundation*, 36 FCC 147 (1964).

number of children in the audience was at a minimum. *Id.* & n. 3.[12]

Two more recent cases dealing specifically with Section 1464 are essential to an understanding of the Commission's finding of indecency in the present Pacifica case.

The Commission imposed a $100 forfeiture on a Philadelphia station in 1970 after finding that the station had broadcast an interview in which the guest had used the words "fuck" and "shit" gratuitously and repeatedly throughout the program. The Commission held that the words in themselves were not obscene under the standards set forth in this Court's decisions because they did not appeal to the "prurient interest" of listeners.[13] But the Commission gave separate meaning to the prohibition of "indecent" language in Section 1464. It found that this language, which "fosters no debate, serves no social purpose, and would drastically curtail the use of radio for millions of people," was indecent when broadcast at a time when children were in the audience. ***Eastern Educational Radio (WUHY-FM)***, 24 FCC 2d 408 (1970).

[12] See also *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190 (1966), *aff'd*, 403 F. 2d 169 (D.C. Cir.), *cert. denied*, 394 U.S. 930 (1969), where the Commission renewed a radio license despite complaints that the station had refused to censor anti-Semitic material from certain programs. The Commission said that "its function is not to judge the merit, wisdom, or accuracy of any broadcast discussion or commentary * * *." *Id.* at 191.

[13] *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1965); *Roth* v. *United States*, 354 U.S. 476 (1956).

The Commission relied crucially upon the differences between radio and other media and the likelihood of exposure of children to offensive material in articulating its indecency standard:

> *[I]t is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public * * * under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. * * * No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions, serving no purpose but to shock, to pander to sensationalism.

24 FCC 2d at 411. The Commission said the test for "indecency" was whether the material was (1) patently offensive by contemporary community standards, and (2) utterly without redeeming social value, without regard to any appeal to the prurient interest. 24 FCC 2d at 412.

The Commission recognized that it was acting in a sensitive constitutional area and invited a judicial test of its standard:

> [A] most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. * * * [W]e would welcome such review, since only in that way can the pertinent standards be definitively determined.

24 FCC 2d at 415. The station did not seek judicial review.

Three years later, in response to complaints about a so-called "topless radio" program in which a talk show host discussed sexual topics with call-in listeners, the Commission imposed a forfeiture of $2,000 on the licensee for using obscene and indecent language. The programs, broadcast in the early afternoon, had consisted in large part of conversations in explicit terms about such matters as oral sex, including graphic descriptions by callers of their own experiences and fantasies. The Commission found that the host of the show had "coaxed responses that were designed to titillate—to arouse sexual feelings." *Sonderling Broadcasting Corp.*, 27 Pike & Fisher Rad. Reg. 2d 285, 290, *reh. denied*, 41 FCC 2d 777 (1973), *aff'd sub nom. Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397, *reh. denied*, 515 F. 2d 407 (D.C. Cir. 1975).

In that case, because the Commission found both an appeal to the prurient interest and a strong element

of pandering,[14] it held the broadcasts to be obscene. The Commission relied heavily upon the pervasive and intrusive qualities of radio and the presence of children in the audience during the early afternoon hours.[15] On reconsideration, the Commission expanded on the importance of children to its decision:

> [W]e concluded that the material broadcast by Sonderling was impermissible even without taking children into consideration. * * * We went on to point out, however, that children were "in the audience during these afternoon hours," and we cited evidence which indicated that the program was "not intended solely for adults." From this, we concluded that "the presence of children in the broadcast audience makes this an *a fortiori* matter." The obvious intent of this reference to children was to convey the conclusion that this material was unlawful, and that it was even more clearly unlawful when presented to an audience which included children.

41 FCC 2d at 782.

The Commission stated, as an alternative ground for its *Sonderling* decision, that the broadcasts also had violated the prohibition against indecent language, as set forth in Section 1464 and applied in *WUHY–FM*.[16] It found that some of the "topless radio" broad-

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[14] *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

[15] In fact, the Commission found evidence that the program had not even been *intended* solely for adults, but that it had explicitly solicited young listeners. 27 Pike & Fischer Rad. Reg. 2d at 292.

[16] *Eastern Educational Radio* (*WUHY–FM*), 24 FCC 2d 408.

casts had been patently offensive by contemporary community standards for broadcast matter and utterly without redeeming social value. 27 Pike & Fischer Rad. Reg. 2d at 290, 292.

Once again, the Commission "welcome[d] and urge[d] judicial consideration of our action." *Id.* at 293. Although the licensee paid the forfeiture and did not seek judicial review, a citizens group did take the matter to court. In a unanimous opinion, the District of Columbia Circuit affirmed the finding of obscenity, relying significantly upon the pandering aspects of the program and the presence of children in the audience. *Illinois Citizens Committee* v. *FCC,* 515 F. 2d at 404–05. The Court did not reach the question of "the constitutionality of its [the FCC's] interpretation and application of the term 'indecent.' "[17]

In summary, at the time of the Commission's ruling on the Pacifica complaint, there was a growing body of regulatory caselaw establishing and applying standards of indecency as well as obscenity in broadcasting. Protection of children, recognition of privacy rights, and concern about the intrusive nature of the broadcast media were factors the Commission and the courts had recognized as relevant. Although the courts had not had occasion to rule directly on the separate standards for indecency, the Seventh and Ninth Circuits at least had contemplated that such standards might be permis-

[17] On a petition for rehearing and suggestion for rehearing *en banc*, only Chief Judge Bazelon stated that he had voted to grant rehearing *en banc*. 515 F. 2d. at 407.

sible.[18] The District of Columbia Circuit had expressly avoided the indecency question in *Sonderling.*

C. *The Controversy.* The Pacifica Foundation operates WBAI–FM in New York City as a non-commercial radio station. Its broadcast of a recorded monologue during the early afternoon provoked a complaint by a man who had heard the broadcast while driving his car. The complaint stated:

> Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air * * * . Any child could have been turning the dial, and tuned in to that garbage.

(App. 2.) The man added that his young son was with him when he heard the broadcast, "and, unfortunately, he can corroborate what was heard." (App. 3.) The Commission forwarded the complaint to Pacifica and asked for its response.

Pacifica stated in its response that the complaint grew out of "a satirical monologue broadcast during the course of a regularly scheduled live program * * * at approximately 2:00 p.m." Pacifica identified the monologue as one from the record album "George Carlin, Occupation: FOOLE." The program had consisted that day of commentary and discussion with

[18] *Tallman* v. *United States*, 465 F. 2d 282; *United States* v. *Smith*, 467 F. 2d 1126; *Gagliardo* v. *United States*, 366 F. 2d 720 These were all criminal prosecutions under Section 1464, rather than regulatory actions. *United States* v. *Simpson*, 561 F. 2d 53, which later held that indecency was subsumed in obscenity, also was a criminal case.

call-in listeners on "contemporary society's attitudes toward language." (App. 3–4.) Pacifica offered the following explanation or justification, which we quote at length:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue.
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.
>
> His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.
>
> As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

(App. 3–4).

Pacifica later informed the Commission that it had no recording or transcript of the program, and that no script had been prepared in advance for the live broadcast. (App. 5.) The Commission obtained a copy of the Carlin recording and made its own transcript of the monologue, entitled "Filthy Words." (App. 19–24.) The monologue runs about 11 minutes and 45 seconds.

Pacifica did not deny that the words it had broadcast were offensive by contemporary community standards for the broadcast media. It did not deny that the broadcast had occurred at a time when children undoubtedly were in the audience, nor did it attempt to justify its selection of that time period for such a broadcast. Its sole justification was the statement quoted above.

In its opinion and order released February 21, 1975 (App. 6), the Commission stated that it was not retreating from previous decisions recognizing the broad programming discretion broadcast licensees en-

joy. It was concerned in this case, it said, with a limited number of patently offensive words in the unique context of broadcasting. As it had done in *Eastern Educational Radio* (*WUHY–FM*), the Commission recognized that the words were not obscene because there was no appeal to the prurient interest.

The Commission once again identified and discussed the peculiar characteristics of radio that justify the unusual order of First Amendment values (App. 12–13):

1. Children have easy access to radio and in many cases are unsupervised by parents or other responsible adults.

2. Radio receivers are in the home where individual rights to privacy are entitled to particular respect.

3. Unconsenting adults may tune into a station without warning that offensive language is to be broadcast.

4. The scarcity of radio frequencies requires government regulation through licensing in the public interest.[19]

Rather than issue a sweeping ban of offensive language, however, the Commission approached the problem more narrowly, both by focusing its ruling on the language "as broadcast" and by trying to

[19] In addition, the Commission acknowledged its express statutory responsibility to promote the larger and more effective use of radio in the public interest. 47 U.S.C. § 303(g). Widespread use of indecent words would impair the usefulness of radio as an effective communications medium for all, and particularly to children and unconsenting adults, the FCC said. (App. 18.)

"channel" such material away from the times when children were most likely to be in the audience. Placing the problem in general context, the Commission stated:

> [P]atently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. *Williams* v. *District of Columbia,* 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter* v. *United States,* 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood.

(App. 14.) The Commission then tied its analysis to the interest it considered most important:

> [I]t is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium,

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> sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

(App. 14–15.)

Distinguishing the kind of language it was "channeling" to late hours from "obscene" language that could be banned altogether, the Commission stated:

> In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM,* 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15.) When the danger of exposure to children is reduced, the Commission said, "a different standard might conceivably be used." The definition of indecent would remain the same; but the agency would consider whether the matter broadcast, despite its use of offensive language, had serious literary, artistic, political or scientific value. (App. 15–16.)

The Commission then stated its holding on the facts of this case, applying the principles it had articulated:

> [T]he Commission concludes that words such as 'fuck', 'shit', 'piss', 'motherfucker', 'cocksucker', 'cunt', and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464.

(App. 16–17.) No sanctions were imposed.

The Commission explained that it was using a declaratory order in this case "to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge 'indecent language.'" Such an order, it said, also "will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration." (App. 17.) Pacifica did not seek reconsideration.[20]

D. ***The Decision Below.*** On April 28, 1975, Pacifica sought judicial review. In the court of appeals, Pacifica relied for the first time on factual materials and legal arguments which it had never advanced before the Commission.[21]

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[20] The Radio Television News Directors Association filed a petition for clarification, and, in response, the Commission emphasized again that it had not banned indecent language altogether "but rather sought to channel it to times of day when children most likely would not be exposed to it." The agency also stated that it would not hold licensees responsible for indecent language broadcast during live coverage of public or news events. (App. 42, 43 n. 1.)

[21] The factual materials included literary works containing words allegedly encompassed by the Commission's definition of indecent; examples from the White House Tapes; and excerpts from newspapers and magazines. These materials appeared in Pacifica's Appendix B, 28–44, in the court below, and were relied

(Continued)

A sharply divided panel of the D.C. Circuit reversed the Commission's order. Circuit Judge Tamm, in one opinion, did not reach "the perplexing question whether the FCC, because of the unique characteristics of radio, and television, may prohibit non-obscene speech". (App. 46.) Judge Tamm agreed with the Commission that "indecency" in 18 U.S.C. § 1464 had never been construed authoritatively by the federal courts (App. 56–57); but, without resolving that question, he concluded that the Commission's order was overbroad and vague in violation of the no-censorship prohibition of 47 U.S.C. § 326. (App. 64.) Judge Tamm did not consider whether the language "as broadcast" was indecent.

Chief Judge Bazelon, concurring in Judge Tamm's result but not in his reasoning, took the position that the Commission's definition of "indecent" abridged the First Amendment because Section 1464 prohibits only hard core pornography meeting all of the tests set forth in *Miller* v. *California,* 413 U.S. 15 (1973).

Judge Bazelon conceded, as the caselaw required him to do, that "[n]o single Supreme Court decision directly forecloses" the Commission's argument in

(Continued)
upon in the court's opinion. (App. 54 n. 15, 60 n. 19). Section 405 of the Communications Act provides that no question of fact or law may be raised on appeal which has not first been raised before the Commission. "Under 47 U.S.C. § 405 [a] court is precluded from entertaining objections to issues which the Commission has not first been invited to rule upon through a petition for rehearing." *Hansen* v. *FCC*, 413 F. 2d 374, 376 (D.C. Cir. 1969).

favor of a separate "indecency" concept for the broadcast media. (App. 78–79.) However, he found that recognition of such a concept would go beyond any of the Court's decisions. Thus, also without reviewing the narrow ruling on the language "as broadcast," Judge Bazelon found the Commission's order overbroad.

In dissent, Judge Leventhal said that the fundamental error of the two majority opinions was their failure to review the narrow case that was before the court, limited to the language as broadcast (1) in the early afternoon when children were in the audience, and (2) with "persistent, almost lavishly loving reiteration of the special words * * *." (App. 91, 98.) Restricting his own scrutiny to the controversy over Pacifica's broadcast of the Carlin monologue in the early afternoon, Judge Leventhal found no violation of statutory or constitutional restrictions by the Commission. He said he would affirm the Commission's "effort to define 'indecent' in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.*"[22] Judge Leventhal concluded:

> In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation.

(App. 97.)

[22] *Miller* v. *California*, 413 U.S. 15 (1973).

SUMMARY OF ARGUMENT

I

This case presents to the Court two issues for resolution. The first and broader question is whether the term "indecent" in 18 U.S.C. § 1464 should be subsumed into the term "obscene" as it has in some other federal statutes. In construing the "indecent" as used in other federal statutes, this Court has indicated that the indecent would be subsumed into the obscene as defined in *Miller* v. *California*, 413 U.S. 15 (1973). See, *e.g.*, *Hamling* v. *U.S.*, 418 U.S. 87 (1974). However, the Court has been very careful not to refer to Section 1464, which applies to radio communication. On the other hand, the Court has consistently recognized that broadcasting differs from other methods of communications, giving rise to "unique and special problems not present in the traditional free speech case." See, *e.g.*, *Columbia Broadcasting System*, 412 U.S. at 101.

(1) Four factors were identified in the Commission's decision which warrant giving special meaning to the "indecent" as it applies to radio communication: children have easy access to radio and in many cases are unsupervised by parents or other responsible adults; radio receivers are in the home, where individual rights to privacy are entitled to particular respect; unconsenting adults may tune into a station without warning that offensive language is to be broadcast; and the scarcity of radio frequencies requires government regulation through licensing in the public interest.

A concern for children was at the heart of the Commission's interpretation of the indecency prohibition in Section 1464. It also relied on this Court's recognition that the parental interests in the "upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213–214; *Ginsberg* v. *New York*, 390 U.S. 629, 637–643 (1968). To a lesser extent the Commission also sought to afford some protection to unconsenting adults who did not want indecent material thrust upon them in the sanctuary of their homes. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970). (App. 16.)

(2) Besides the intrusive and pervasive qualities of broadcasting, which require special treatment, from the beginning of government regulation of radio, federal courts have recognized that broadcasters are public trustees subject to a higher standard of conduct than the morals of the marketplace. *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F. 2d 670 (D.C. Cir. 1931). Broadcasters must program in the interest of the community they are licensed to serve, and the Commission may not renew a broadcast license unless it finds that a broadcaster has ascertained and served the needs of its community *United Church of Christ* v. *FCC*, 425 F. 2d 543 (D.C. Cir. 1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Broadcasters must also give special attention to the programming needs of children. "Broadcasters have a special responsibility to children," because of their immaturity. *Children's Television Report and Policy Statement,* 50 FCC 2d 1, 5, and 11 (1974). The Commission has also reported to Congress that licensee self-regulation is more desirable than rigid governmental standards to protect children from objectionable programs dealing with sex and violence. Obscene and indecent material is proscribed by statute, and the Commission will meet its responsibility in this area. *Report on Broadcast of Violent, Indecent and Obscene Material,* 51 FCC 2d 418 (1975).

II

The second issue presented is much narrower: whether the Commission reasonably concluded that certain words in the Carlin monologue were indecent "as broadcast." Its holding was based on the following undisputed factors: the words broadcast depicted "sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium"; the words were broadcast "when children were undoubtedly in the audience * * * in the early afternoon"; the words had been "prerecorded," were "repeated over and over and were deliberately broadcast." Judge Leventhal would have affirmed this holding because it necessarily included the limitations of time, the early afternoon, and the manner of presentation, deliberate repetition. (App. 94, 104.)

The majority below, without ever focusing on the Commission's specific ruling, concluded that the Commission's order was vague and overbroad. As Judge Leventhal observed, the basic error of the majority grew out of their failure to review the narrow case that was before the court, limited to words broadcast in the early afternoon when children were in the audience and with "persistent almost lavishly loving reiteration of the special words * * *." (App. 91, 98.) Society has a special concern to protect young children from sexually explicit materials. *Miller* v. *California,* 413 U.S. at 19; *Ginsberg* v. *New York,* 390 U.S. at 637–43. Here the FCC in essence held that the broadcast licensee had abused its special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual and excretory organs and activities in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience.

Government has the authority and duty to assist parents "in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified * * * as society's concern with the quality of its community life." (App. 106–107.) Restrictions may be

imposed because of broadcasting's intrusion into the privacy of the home and its captivity of young unsupervised children. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975). In the past, broadcasters have made time distinctions, and time, place, and manner of speech may be regulated by channeling and zoning. *Young* v. *American Mini Theaters, Inc.,* 427 U.S. 50, 63 n. 18 (1976). Here, "protection of children is a compelling state interest," and this nation's law "is an ethical determinant and a moral force." (App. 107 & n. 18.)

ARGUMENT

I. THE PECULIAR CHARACTERISTICS OF BROADCASTING AND THE SPECIAL PUBLIC OBLIGATIONS OF BROADCAST LICENSEES PERMIT THE COMMISSION TO REGULATE INDECENT LANGUAGE IN SUCH A WAY AS TO PROTECT UNSUPERVISED CHILDREN, EVEN THOUGH THE LANGUAGE MIGHT NOT BE OBSCENE.

Pacifica urged in the court below that the term "indecent" is subsumed in the term "obscene" and that Section 1464 prohibits only hard core obscenity as defined in *Miller* v. *California,* 413 U.S. 15. In Pacifica's view, a station may broadcast any material which does not meet the *Miller* test, regardless of the time of day or composition of the audience.[23]

[23] The transcript of some recent broadcasts on an educational station in Philadelphia illustrates a logical extension of Pacifica's abstract principle. Much of the material, while apparently indecent, is not hard core pornography. On December 4, 1975, the Commission issued a Notice of Apparent Liability for violations of 18 U.S.C. § 1464. The Commission employed the indecency standard enunciated in the declaratory order challenged here. See Addendum to FCC Petition for Certiorari in this case, and 57 FCC 2d 782 (1975).

Judge Tamm did not reach this question. (App. 45–64.) Chief Judge Bazelon appeared to agree with Pacifica. (App. 64–91.)

At the time of the Commission's Order, all judicial precedent indicated that "indecent" had a separate and distinct meaning from "obscene" in Section 1464. *Tallman* v. *U.S.,* 465 F. 2d 282, for example, rejected the argument that the term "indecent" was unconstitutionally vague. There the court found that "indecent" conveyed "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." 465 F. 2d at 285. See also *U.S.* v. *Smith,* 467 F. 2d 1126; *Gagliardo* v. *United States,* 366 F. 2d 720. *Cf. Williams* v. *District of Columbia,* 419 F. 2d 638.

If *United States* v. *Twelve-200 Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), is controlling here, Pacifica's argument may be correct. See also *United States* v. *Simpson,* 561 F. 2d 53, 60. But this Court has never addressed the broadcast context in construing the "indecent" as a separate concept from the "obscene." In *Twelve-200 Ft. Reels,* this Court considered the meaning of "indecent" in two statutes governing interstate transportation, and said it was "prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California* * * *." 413 U.S. at 130 n. 7. Later, the Court applied that reasoning to a mail statute in *Hamling* v. *U.S.,* 418 U.S. 87. In neither case did this Court make any refer-

ence whatsoever to Section 1464 or to radio communication.

On the other hand, this Court has recognized, in a long line of cases, that broadcasting is different from other media of communications for some regulatory purposes.[24] Our contention rests on two propositions: that broadcasting has unique qualities, and that broadcast licensees bear special obligations. Because these factors distinguish it from other means of communication, the cases on which Pacifica and Chief Judge Bazelon relied do not foreclose this Court from determining that "indecent" has a separate and distinct meaning from "obscene" in Section 1464.

The FCC rested heavily upon this Court's finding that "the values of parental direction of the religious upbringing and education of their children in their

[24] Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (political-editorial and personal attack rules upheld) *with Mills* v. *Alabama*, 384 U.S. 214 (1966) (prohibition of election day editorial invalidated); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (right to reply, but no right to buy time), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (no right to reply in newspaper). See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977) (broadcasting warrants "special consideration"); *Buckley* v. *Valeo*, 424 U.S. 1, 49–50 n. 55 (1975) (broadcasting gives rise to "unique and special problems not present in the traditional free speech case"); *Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 376, 387 (1973) (broadcasting has "peculiar characteristics" which distinguish it from newspapers); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971), *affirmed sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) ("The fact is that there are significant differences between the electronic media and print.")

early and formative years have a high place in our society." *Wisconsin v. Yoder,* 406 U.S. 205, 213–214; *Ginsberg* v. *New York,* 390 U.S. 629; *Rowan* v. *Post Office Dept.,* 397 U.S. 728. Young children lack the judgment necessary to consent to exposure to patently offensive language depicting sexual and excretory activities and organs. When unsupervised, they constitute a captive audience incapable of avoiding exposure. Forcing such material upon young unsupervised children in their homes under the pretense of preserving so-called adult access rights is precisely the sort of intolerable intrusion on privacy that this Court has sought to proscribe. *Rowan* v. *Post Office Dept.,* 397 U.S. 728.[25]

In the paragraphs that follow, we discuss briefly the two factors that we believe distinguish broadcasting from other media of expression for purposes

[25] In recent decisions, this Court has limited adult access rights even in non-broadcast cases. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), for instance, the Court held that a theater owner was not immune from prosecution because performances were attended solely by consenting adults. See also *United States* v. *Thirty Seven Photographs*, 402 U.S. 363 (1971) (seizure of materials intended for private use from the luggage of a returning tourist); *United States* v. *Reidel*, 402 U.S. 351 (1971) (upholding federal statute prohibiting the mailing of material to consenting adults). *Paris* established that so-called adult access rights end when they cause an intolerable intrusion upon the privacy of others. When such an intrusion occurs, the Court said, the interest of the state in the quality of life and the total community takes precedence over any right of access. 413 U.S. at 69, See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205.

of regulating indecency: the peculiar characteristics of the broadcast media, and regulation of licensees under the public interest standard.

1. In its 1960 *Programming Policy Statement,* the Commission stated:

> [R]adio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature * * *. Thus, for example, while a nudist magazine may be within the protection of the First Amendment * * * the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464 * * *. Similarly, regardless of whether the "four-letter words" and sexual description, set forth in *"Lady Chatterley's Lover,"* (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and Section 1464 questions.

Programming Policy Statement, 44 FCC at 2307 (quoting the Commission's brief in *Grove Press* v. *Christenberry,* No. 25,861, 2d Circuit).

A decade later the President's Commission on Obscenity and Pornography, which recommended abolition of *all* obscenity laws, agreed that broadcasting should be subject to specific rules to be enforced by the FCC "should the need arise," because there was "a potential in this area for thrusting sexually explicit materials upon unwilling persons."[26] During the 1970s, more and more complaints from the general public and Congress called upon the FCC to act. See, *e.g., WUHY, supra,* 24 FCC 2d 408; Sonderling *Broadcasting Corp., supra,* 41 FCC 2d at 778 and n. 6; *The Trustees of the University of Pennsylvania,* 57 FCC 2d 782.

Before considering the indecency prohibition in this case, the Commission first attempted to identify those factors which distinguish broadcasting from other methods of communication. Four important considerations were identified:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.* * * *; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which

[26] *The Report of the Commission on Obscenity and Pornography,* Bantam Ed. (1970), p. 73, n. 11, stated: "The broadcasting or telecasting of explicit sexual material has not constituted a serious problem in the past. There is, however, a potential in this area for thrusting sexually explicit materials upon unwilling persons. Existing federal statutes imposing criminal and civil penalties upon any broadcast of 'obscene' material do not adequately address this problem because they do not describe with sufficient specificity what material would be prohibited, or under what conditions. Hence, the repeal of these statutes is recommended, upon the understanding that the Federal Communications Commission either already has, or can acquire through legislation, adequate power to promulgate and enforce specific rules in this area should the need arise."

> the government must therefore license in the public interest.

(App. 13.)

Radio communication is unique because it is directed indiscriminately toward the public. It is both pervasive and intrusive. Listening to the radio, a passive act, is different from reading a book or magazine or watching a movie. To gain access to risque literature or motion pictures, a consumer must enter a store or theater and make a purchase. Book store and movie theater proprietors can exclude persons who are under age. Parents also find it simpler to regulate the use of magazines, books and movies. Parents can and do segregate from the family library books considered unsuitable for children. Parents can and do monitor the movies their children must pay to see. But broadcasts are much more difficult for parents to supervise. Broadcasts are easily accessible to young persons even in the privacy of the home, without the need for comparable affirmative acts. Unlike a book store owner or theater operator, a broadcast licensee cannot rely upon parental scrutiny as an effective means of sorting out and excluding youthful customers.

Judge Leventhal summed up these differences succinctly:

> A crucial reality, dominating the case at hand, is the widespread access of radio to children. Radio is relatively inexpensive in initial capital cost, and virtually a free good in terms of operating expense. Widespread freedom of selection of programs by children is not only a

> condition, it is often a necessity. Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsupervised during the day. In this totality of conditions, one cannot waive away the radio–TV problem on the ground that the (mature) person can readily switch the channel.
>
> * * *
>
> The reality of broadcasting's special access to the home conjoins with the passivity of TV–radio reception—a mere click, without current purchase. Indeed there is passivity after the click, with TV–radio stations being frequently left to a dial position previously set, unless there is an "alert" of some kind.

(App. 99, 100; footnote omitted.)

Although many parents try to monitor their children's viewing and listening—particularly during the evening when parents themselves rely on radio and television for entertainment—it is unrealistic to expect parental oversight all the time. When unsupervised children are in the audience, Section 1464 and the public interest standard require broadcasters to recognize this fact and to program accordingly. A broadcaster should not force parents to accept the risk that children will be exposed to broadcasts of patently offensive words depicting sexual and excretory activities or organs. As Judge Leventhal pointed out, "Even the most earnest advocates of

freedom accept the role of government in protecting those who lack capacity." (App. 102.)

The differences go to *avoidance* as well as to *access*. Just as children may gain access to offensive material over the air without affirmative action on their part, so it requires affirmative acts of avoidance to escape the stuff once it has come on the air. Young children may have neither the capacity to consent to nor the judgment to avoid what many parents believe would be inappropriate for them to see or hear. While a broadcast may have value for adults, this "does not mean it has such value in a broadcast geared to children—or in a broadcast where a substantial number of children are likely to be in the audience without parental supervision."[27]

Congress, the Commission, and the Courts have recognized the significant differences between electronic and print media, especially where young people are involved. In 1969, Congress made "unlawful the advertising of cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[28] When that law was challenged on First and Fifth Amendment grounds, the district court, in upholding the ban, recognized that cigarette ads which were broadcast "were particularly effective in reaching a very large audience of young people." *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 585–86 (D.D.C.1971),

[27] Judge Leventhal, dissenting in this case, and citing *Ginsberg* v. *New York*, 390 U.S. 629. (App. 105.)

[28] 84 Stat. 89, 15 U.S.C. § 1335.

aff'd, 405 U.S. 1000. (1972). The court found "strong evidence of a great attraction on the part of young people to the broadcast media." 333 F. Supp. at 586 n. 13, and observed:

> Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that *the younger the individual, the greater the reliance on the broadcast message rather than the written word.* A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear and understand a television commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard.

333 F. Supp. at 586 (emphasis added).

2. Government has a vital role in regulating the use of the limited radio spectrum. The scarcity of frequencies imposes special obligations on broadcasters, and warrants closer government scrutiny of radio than of other media. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, rested upon the finding that broadcasting consumed scarce spectrum space, a feature which would justify different First Amendment standards. Writing for this Court, Mr. Justice White stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.

395 U.S. at 388. The Court reaffirmed that principle in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. at 101, recognizing "an unusual order of First Amendment values."

The D.C. Circuit dramatically outlined the rights of the public and the obligations of the broadcasters and the FCC in *United Church of Christ* v. *FCC,* 359 F. 2d 994 (1966). That Court, through then Circuit Judge Burger, stated:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot * * *. [A] broadcast license is a public trust subject to termination for breach of duty.

359 F. 2d at 1003.

The station licensee in this case ignored its special obligations, in essence claiming a right to be judged by the standard which might apply to a privately operated "adult" entertainment establishment and not the higher standard applicable to public trustees. *Lorain Journal* v. *FCC,* 351 F. 2d 824, 830 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *Yale Broadcasting* v. *FCC,* 478 F. 2d 594 (D.C. Cir.), *cert. denied,* 414 U.S. 914 (1973).

Since the beginning of radio regulation, courts have recognized that broadcasters are public trustees subject to a higher standard of conduct than the morals of the marketplace. *KFKB Broadcasting Ass'n.* v. *F.R.C.,* 47 F. 2d 670; *Lorain Journal,* 351 F. 2d at 830. See generally, *Freedom and Responsibility in Broadcasting,* pp. 96–170, Northwestern U. Press (1961), for a comprehensive historical review of government regulation of broadcasting.

Broadcasters must program in the public interest of the community they are licensed to serve, and the FCC may *not* grant, modify, or renew a broadcast license without finding that the operation of the station is in the public interest. 47 U.S.C. §§ 307(d), 308, 309; *United Church of Christ* v. *FCC,* 425 F. 2d 543. "An important element of the public interest * * * is the ability of the licensee to render the best practicable service to the community reached by his broadcasts * * *." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216. The Commission, local citizens and broadcasters have struggled to perfect the methodology for carrying out this duty.[29]

Recently, after lengthy rulemaking proceedings, the Commission issued a *Children's Television Report and Policy Statement,* 50 FCC 2d 1, *affirmed sub nom. Action for Children's Television* v. *FCC,* 564 F. 2d 458 (D.C. Cir. 1977). The report concluded that: "Broadcasters have a special responsibility to children." 50 FCC 2d at 5, 11. In affirming the report, the D.C. Circuit characterized it as simply clarifying "the efforts expected of broadcast licensees in fulfilling

[29] See *e.g., Henry* v. *FCC,* 302 F. 2d 191 (D.C. Cir.), *cert. denied,* 371 U.S. 821 (1962); *Stone* v. *FCC,* 466 F. 2d 316, 323, n. 21 (D.C. Cir. 1972); *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 FCC 2d 650, 36 Fed. Reg. 4092 (1971), *modified,* 57 FCC 2d 418, 41 Fed. Reg. 1372 (1976).

their public interest obligations to the child audience." 564 F. 2d at 480.

Shortly after the adoption of the declaratory order in this case, the Commission reported to Congress on the steps that could be taken to protect children from objectionable programs. *Report on Broadcast of Violent, Indecent and Obscene Material,* 51 FCC 2d 418. A unanimous Commission adopted the report to Congress, which reached this conclusion:

> *With respect to questions of obscene and indecent material, direct governmental action is required by statute, and the Commission intends to meet its responsibilities in this area.* With respect to the broader question of what is *appropriate* for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe the this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective.

51 FCC 2d at 419 (emphasis added).

In its declaratory order the FCC sought to give discrete meaning to the indecency prohibition in 18 U.S.C. § 1464, which the agency is obligated to enforce by regulatory action. This statutory prohibition applies only to the broadcast media, which for the variety of reasons set forth above are different from other modes of expression and therefore warrant different treatment.

II. THE COMMISSION'S ORDER SHOULD HAVE BEEN REVIEWED AS A RULING ON A SPECIFIC SET OF FACTS, AND, AS SUCH, SHOULD HAVE BEEN AFFIRMED AS A REASONABLE AND LAWFUL FINDING OF INDECENCY UNDER THE STATUTE AS APPLIED.

Although the Commission in this case resolved a specific complaint and limited its holding to the language "as broadcast," the majority below treated the opinion and order "as though it prohibited any TV or radio broadcast which included one of the seven words * * *." (App. 93.) On the basis of that erroneous reading of the order, two judges found it to be over-broad and vague.[30] But, as Judge Leventhal pointed out in dissent:

> The Commission held only "that the language *as broadcast* was indecent and prohibited by 18 U.S.C. 1646". The words were indentified as depicting "sexual activities and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media," and further identified as "prerecorded language with the words repeated over and over * * * deliberately broadcast." But over and above the Commission's focus on the deliberate repetition of these words, was a clear

[30] Review of an *ad hoc* ruling on specific facts under an "overbreadth" approach is puzzling. Neither judge in the majority found the *statute* overbroad; nor were any FCC *rules* or *regulations* struck down as overbroad. It would seem that the majority found the potential for overbreadth in the rationale underlying the Commission's *ad hoc* ruling on the Pacifica complaint. We question the logic of such an analysis. See generally, Note: *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

and crucial emphasis on the timing of the broadcast. It was vital to the order that the words were broadcast "in the early afternoon" when "children were undoubtedly in the audience." The order specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent particularly when children are in the audience" would not force on the general listening public ideas "fit only for children."

Commissioners Reid and Quello stated that in their view the declaratory order should have gone further and prohibited such language at any time of the day or night. That was a minority expression. Chairman Wiley concurred only in the result. Commissioner Robinson, joined by Commissioner Hooks, concurred on the ground of time limitation, as a reasonable measure "to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent."

In light of this array of concurrences, the Commission's decision must be read narrowly, limited to the language "as broadcast" in the early afternoon.

(App. 93–96; footnotes omitted.) The Commission believes its order should have been read narrowly and reviewed as an *ad hoc* ruling. See, clarification order in this case. (App. 41–44.) See also, *Yale Broadcasting Co.* v. *FCC*, 478 F. 2d at 602. When the Commission and the Courts confront a different set of

facts, they can then determine whether the principles announced in the declaratory order should be applied, modified or extended.[31]

It is especially appropriate to review the order narrowly in this case, because Pacifica never sought reconsideration from the Commission. Instead, it placed before the court below for the first time in a separate appendix a host of literary, dramatic, poetic, and religious works which were allegedly banned by the Commission's ruling. The majority below, instead of reviewing the Commission's narrow holding, concluded that the Commission had banned these works. (App. 54 n. 15, 60 n. 19.)

The error of the court below may be traceable to Pacifica's conduct of the case. Because the Commission never was asked to consider Pacifica's literary materials, there was nothing in the record to indicate whether the Commission had intended to reach them

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[31] This process already has begun with the Commission's action on a petition for clarification of the declaratory order. (App. 41–44.) The Commission added further gloss to the staute and its application in comments filed with Congress on a legislative proposal for amendment of the broadcast obscenity-indecency statute. In those comments, the Commission expanded on it views as to what constitutes a "child" and what it believes to be appropriate regulation of "indecent" material when children are not in the audience. See FCC's Legislative Proposal and Comments, reported at 122 Cong. Rec. S17101–17111 (Sept. 29, 1976), S17106 and S17109 nn. 118–123. It is altogether appropriate for the Commission to use "an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (App. 103.) That is what the Commission is doing in this difficult regulatory area. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 395–96; *Yale Broadcasting* v. *FCC*, 478 F. 2d at 602.

with its prohibition. The majority might have assumed that Pacifica had properly brought those materials to the Commission and that the agency had deliberately left their status unresolved. But this was not the case.

The Commission had ruled only on the language as broadcast, while taking the opportunity to issue a declaratory order that would guide the public and broadcast licensees. Pacifica's post-record parade of horribles—apparently accepted by a majority of the court below—simply clouded the narrow decision that had been made. Both of the opinions below which reversed the FCC's decision failed to review the matter as one disposing of a particular case. As a result, both opinions broadly disabled the Commission to perform its statutory duty to take action against indecent broadcast material.[32]

This Court has long recognized a special societal concern for protecting young children from sexually explicit materials. *Miller* v. *California*, 413 U.S. at 19; *Ginsberg* v. *New York*, 390 U.S. at 637–643. The concern recognizes not only the State's interest, *parens patriae*, in the moral and emotional adjustment of children, but also the right of parents to rear their children according to their own best judgment. *Wisconsin* v. *Yoder, supra*, 406 U.S. at 213–14.

[32] In a sense, we are contending that the court of appeals itself issued a ruling that is overbroad, in that it decided matters that were not before that court for review.

"Exposure to children marks a special enclave in the law of freedoms of publication." (App. 96.)[33]

The Commission shaped its declaratory order to protect this interest. In essence, the Commission held that the complainant in this case was entitled to assistance from the Commission where this broadcaster, who has been entrusted with a scarce public resource, abused that special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience.[34]

As Judge Leventhal observed, the government has the authority under the Constitution

> to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family

[33] "[A]State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 214 n. 11. See also Mr. Justice Stewart's concurring opinion in *Ginsberg* v. *New York*, 390 U.S. at 648–650.

[34] To a lesser extent, the Commission also recognized the rights of unconsenting adults "who do not want the type of language broadcast in this case thrust into the sanctuary of their homes. *Cf. Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738." (App. 16.) As to unwilling adults, the broadcaster must make substantial efforts to warn them that indecent language will be broadcast. (App. 16.)

> areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified * * * as society's concern with the quality of its community life.

(App. 106–07.) In *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 209, Mr. Justice Powell indicated that selective restrictions on speech are permissible "when the speaker intrudes upon the privacy of the home * * * or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."

Radio communications present both of these special circumstances when children are in the audience. Accordingly, the Commission reasonably concluded that the intrusive qualities of the media require the channeling to appropriate time periods of patently offensive language depicting sexual and excretory activities and organs in the *narrow and precisely circumscribed context* where young, unsupervised children are likely to hear it in the privacy of the home. Dissenting from the judgment below, Judge Leventhal pointed out that broadcast licensees "have the ability to make time distinctions" and that "there is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking * * *." (App. 100–01.) See also *Young* v. *American Mini Theaters, Inc.*, 427 U.S. at 63 n. 18.

The Commission was aware of *Cohen* v. *California*,

403 U.S. 15 (1971), and its progeny.[35] But those cases did not deal with the broadcast media, which for the reasons articulated by the Commission require the recognition of other conflicting interests. The Commission found significant Mr. Justice Harlan's observation that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be banned from the public dialogue." 403 U.S. at 21. It was to give some recognition to this privacy interest, especially when unsupervised children were likely to be in the audience, that the Commission issued its declaratory order. Protection of children was at the heart of the Commission's order, and as Judge Leventhal pointed out in dissent, "protection of children is a compelling state interest." (App. 107.)

Charles Rembar, one of the more successful advocates of freedom of expression in this Court during the 1960's, recently acknowledged that the law in this area has evolved to the point where competing interests and rights should be recognized.[36] Two of the interests he identified parallel those which the Commission's declaratory order recognized—the pro-

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[35] *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Lewis* v. *New Orleans*, 408 U.S. 913 (1972); *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972); *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974).

[36] Rembar, "Obscenity—Forget It," *Atlantic Monthly*, May 1977, pp. 37–41.

tection of children, and the privacy rights of an unwilling audience. Expression may be channeled "to safeguard children or to prevent the infliction of unwanted displays on a captive audience." [37] And Archibald Cox has questioned whether "extending the protection of the First Amendment to sheer vulgarity, useful only in its ability to shock, does not give the vulgarities an imprimatur which contributes to the lowering of public discourse." [38] Since the moral influence of this Court's opinions extends "far beyond the limits of its decrees," Cox queried, "May not its amoral influence be similarly extended?" [39] In a similar vein, Judge Leventhal in dissent quoted with approval the observation that "The law, more than most lawyers seem to realize, is an ethical determinant and a moral force." (App. 107 n. 18.)[40]

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[37] *Id.*, 38.

[38] Cox, *The Role of the Supreme Court in American Government* (1976), pp. 44–48.

[39] *Id.*, 47–48.

[40] See Frankel, *The Moral Environment of the Law*, 61 Minn. L. R. 921, 924–35 (1977); Berns, *The First Amendment and the Future of American Democracy*, 188–205 (1976).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

PACIFICA FOUNDATION, *Respondent*

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PACIFICA FOUNDATION

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BRIEF FOR PACIFICA FOUNDATION

STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions included at pages 2-4 of the Petitioner's brief, this case also involves Section 303(g) of the Communications Act of 1934, as amended, 48 Stat. 1082, 47 U.S.C. § 303(g), which provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * *
>
> * * * generally encourage the larger and more effective use of radio in the public interest.

COUNTERSTATEMENT OF THE CASE

This case presents the question as to whether the Federal Communications Commission (the "Commission") has the authority to proscribe the broadcast of specific words solely on the grounds that they are generally considered to be offensive without regard to the context in which the words are used. The factual context in which this question is presented is summarized below.

On February 22, 1975, the Commission released a *Memorandum Opinion and Order in the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM) ("Order"),* wherein it declared certain words to be "indecent" within the meaning of that term as used in Section 1464 of the United States Criminal Code (18 U.S.C. § 1464) (App. 15-17, ¶¶ 11, 12 & 14).[1] The *Order* was issued in response to a listener's complaint concerning particular material broadcast over non-commercial educational FM Station WBAI, New York, New York, which is licensed to Pacifica Foundation ("Pacifica"), the Respondent herein.[2] The material complained of was a selection entitled "Filthy Words" from the record album "George Carlin Occupation: Foole," which had been recorded before a live audience at the Circle Theatre,

[1] Citations herein to the *Order* will refer to the paragraphs in the *Order*, as well as the pages in the Joint Appendix, where the cited material appears.

[2] Pacifica, a non-profit educational foundation formed in 1946, is dedicated to the operation of non-commercial radio stations. In addition to WBAI, it is the licensee of the following educational FM radio stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; and WPFW, Washington, D.C.

San Carlos, California. This selection was broadcast over WBAI at approximately 2:00 p.m. on a weekday afternoon during the concluding portion of "Lunchpail," a regularly scheduled live program. The subject of "Lunchpail" on the day the selection was broadcast had been contemporary attitudes toward the use of language, and the program's host had presented his own commentary and analysis regarding this topic and discussed the matter by telephone with listeners. The host played the selection "Filthy Words" at the conclusion of the program because he regarded it as an "incisive satirical view of the subject under discussion." (App. 3). Immediately prior to the broadcast of the monologue, listeners were advised that it included language which some might regard as offensive. Those who might be offended were advised to change stations and turn back to WBAI in 15 minutes.

The Commission characterized the selection as a "comedy routine . . . almost wholly devoted to the use of such words as 'shit' and 'fuck,' as well as 'cocksucker,' 'motherfucker,' 'piss,' and 'cunt'" which used these words repeatedly "in a manner designed to draw laughter from [the] audience." (App. 8-9, ¶ 5). In response to an inquiry from the Commission concerning the complaint, Pacifica characterized the selection as a work by "a significant social satirist" which is intended to show that "words which most people use at one time or another cannot be threatening or obscene," and it contended that in the monologue "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." (App. 10, ¶ 6).[3]

[3] The Commission in its brief (Pet. Br. 17) implies that Pacifica, in responding to the Commission's inquiry concerning WBAI's

Although the *Order* was issued by way of response to a listener complaint, the *Order* itself is not limited to the facts of the specific complaint. Rather, it was issued in conjunction with, and as an integral part of, the Commission's *Report on the Broadcast of Violent, Indecent, and Obscene Material ("Violence Report")*, 51 FCC 2d 418, which was submitted to Congress on February 19, 1975, in response to Congressional directives.[4] The *Violence Report* discussed the Commission's statutory responsibilities and authority with respect to the regulation of (i) violent and sex-oriented material and (ii) the use of obscene and indecent language.

In considering the subject of violent and sex-oriented material, the Commission observed that substantial evidence had been compiled regarding the harmful effects of televised violence on children. 51 FCC 2d at 418. The Commission, however, declared that it would

broadcast of the Carlin monologue, somehow admitted "that the words it had broadcast were offensive by contemporary community standards for the broadcast media" and that "the broadcast had occurred at a time when children undoubtedly were in the audience." The Commission arrives at this position by stating that Pacifica "*did not deny*" these assertions. The fact of the matter is that no such assertions were contained in the Commission's inquiry, nor was Pacifica requested to address itself to the specific assertions. The Commission's inquiry only asked for Pacifica "to submit comments" concerning the complaint. Accordingly, the fact that Pacifica's response "did not deny" certain of the facts underlying the Commission's subsequent *Order* cannot be construed as a tacit admission of such facts.

[4] The *Order* was included in the *Violence Report* as Appendix E.

be inappropriate for it to deal with these harmful effects through the regulation of program content since such regulation would raise "serious constitutional questions" and "could lead to extreme results which would be unacceptable to the American public." *Id.* at 419. In this regard the Commission pointed out that short of an outright ban on all forms of violent programming, "the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms," *id.* at n. 5, and it further noted that it would be difficult to strike "an appropriate balance between the need to protect children from harmful material and the adult audience's interest in diverse programming." *Id.* at 420. Finally, the Commission declared that rules dealing with violent programming would "create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium." *Id.* In view of these considerations, the Commission decided that it would be preferable to deal with the harmful effects of violent programming by encouraging the industry to engage in "self-regulation" rather than by "the adoption of rigid governmental standards." *Id.* at 419.

The constitutional constraints and other considerations which led the Commission to conclude that it would be inappropriate for it to deal with the harmful effects of televised violence through direct regulatory action did not, in the Commission's opinion, constitute any impediment to its taking affirmative regulatory action to deal with what it characterized as the "problem" of the broadcast of "indecent" language.[5] (App.

[5] Although the Commission asserts that "indecent language" has the "effect of debasing and brutalizing human beings" (App. 15,

6-7 & 18, ¶¶ 1, 2 & 16). The Commission explained the difference in its power to deal with what it regarded as the harmful effects of violent programming on the one hand and the "problem" of indecent language on the other by pointing to the fact that it has been given the affirmative duty to take direct action with respect to indecent language, whereas it had no such affirmative duty with respect to violent programming. The Commission found its statutory obligation in Section 1464 of the United States Criminal Code (18 U.S.C. § 1464) which makes it a crime to broadcast "indecent language"[6] and in Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) which charges the Commission with the duty to "encourage the larger and more effective use of radio in the public interest." (App. 11 & 18, ¶¶ 7 & 16). In light of what it perceived to be its statutory obligations, the Commission concluded that it would be appropriate for it "to clarify the standards which [it] utilized to judge 'indecent language'" when carrying out these obligations. It was for this purpose that the *Order* was adopted. (App. 7 & 17, ¶¶ 2 & 15).[7]

¶ 11), it cites no evidence to support this assertion. No other harmful effects are attributed to "indecent" language by the Commission. The Commission identifies the broadcast of "indecent" language as a problem because "the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves." (App. 6, ¶ 1).

[6] Section 1464 also prohibits the broadcast of "obscene" and "profane" language, but the *Order* was not addressed to these aspects of the section. (App. 7 & 14, ¶¶ 2 & 10).

[7] It is not Pacifica's intention in highlighting the dichotomy between the Commission's approach to televised violence and its approach to the broadcast of "indecent language" to suggest that the Commission erred in concluding that it is barred by Section 326 of the Communications Act (47 U.S.C. § 326) from regulating the content of television programs. As this brief will demonstrate, the Commission correctly recognized in the *Violence Report* that Section 326 and the First Amendment bar it from regulating program content under the "public interest" standard of Section 303(g).

In the *Order*, the Commission defined "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." (App. 15-17, ¶¶ 11, 12 & 14). The Commission emphasized that "indecent language," as defined in the *Order*,

> is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15, ¶ 11). Thus, under the *Order*'s definition of "indecent" any and all uses of certain words which in their origin or some of their applications refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such words, as actually used in context, describe sexual or excretory activities or organs or whether they are used colloquially in contexts where they cannot conceivably be construed as describing or even referring to sex or excretion. If one of the common usages of a given word is a synonym for a sexual organ or an excretory function, and if the word is also generally regarded as "patently offensive," the *Order* declares that the broadcast of such a word is a crime and contrary to the public interest, regardless of whether the use of the word causes, or could reasonably be expected to cause, injury or

harm to any hearer. The *Order* explicitly forbids the broadcasting of seven specific words,[8] thus creating an *Index Verborum Prohibitorum* to which more words will be added from time to time, presumably on the basis of rulings by the Commission concerning offending words brought to it for judgment.[9]

The *Order* is not at all clear as to the scope or sweep of its command. A great deal of emphasis was placed on the fact that when children may be in the audience offending language cannot be redeemed by the claim that it has literary, artistic, political or scientific value. There is a suggestion in the *Order* that should a licensee broadcast language of the sort encompassed by the Commission's definition of "indecent" during late evening time periods "when the number of children in the audience is reduced to a minimum," the Commission "might conceivably" consider whether material containing indecent language "has serious literary, artistic, political or scientific value" in determining

[8] The seven words are "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit." These words according to the *Order* "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." (App. 16-17, ¶ 14).

[9] Subsequent to the release of the *Order*, a staff ruling on a listener's complaint suggested that the words "blow job" "may be indecent." (Letter dated May 28, 1975 from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, to John Cervase, Esquire). The brief filed in this case by Morality in Media, Inc. as an *amicus curiae* clearly demonstrates that the process of adding to the index of proscribed words will continue. Morality in Media, Inc. lists not seven but *ten* words used in the Carlin monologue which is believes "fit the test." The words thus added are "turd," "twat," and "fart." Brief *Amicus Curiae* of Morality in Media, Inc., at 28 n. 29 and accompanying text.

whether a broadcast was in violation of Section 1464 or contrary to the public interest. (App. 15-16 & 18, ¶¶ 12 & 16).[10] The *Order,* however, makes no square holding on this point, and it leaves the matter in a state of limbo.[11]

The Commission's *Order* did not apply any specific sanctions to Pacifica, the Commission being content to utilize the *Order* as a vehicle to clarify applicable standards. However, the Commission pointedly declared that the *Order* would be associated with the station's license file and "in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." (App. 17, ¶ 14).[12]

The *Order* invited parties "who consider themselves aggrieved or who wish to call additional factors to the

[10] Under the Commission's formulation of the elements which constitute "indecency," there is no need of showing appeal to prurient interest whether the audience be composed of adults or children. The *Order* does not explain why the Commission believes that regulatory action is necessary or appropriate to protect adult audiences from offensive, but non-prurient, material.

[11] It should be noted that Commissioners Reid and Quello issued separate concurring statements wherein they took the position that words of the sort referred to in the *Order* have no place on radio or television in any context or at any time period. (App. 24 & 25). And, shortly after the release of the *Order*, the Commission's then General Counsel took the position before a group of broadcasters assembled for a workshop on "FCC Enforcement" at the National Association of Broadcasters' 1975 Annual Convention in Las Vegas, Nevada, that the broadcast of the Carlin selection at 2:00 a.m. would have been punishable. *Broadcasting*, April 14, 1975 at p. 40.

[12] The threatened sanctions are: (1) license revocation, (2) issuance of a cease and desist order, (3) monetary forfeiture, (4) denial of license renewal, (5) grant of only a short term license renewal. (App. 11, n. 3).

Commission's attention to seek reconsideration." (App. 17, ¶ 15). Pacifica declined this invitation and, instead, sought judicial review of the *Order*. However, the Radio Television News Directors Association ("RTNDA") petitioned the Commission for clarification or reconsideration. In its petition, RTNDA specifically requested that the Commission issue a ruling exempting news and public affairs programming from the sweep of the *Order*. In its *Memorandum Opinion and Order* disposing of RTNDA's petition (App. 41), the Commission adhered to its original *Order* and declined to discuss the *Order*'s scope any further "in the absence of a concrete factual context . . . ." (App. 43-44).[13]

On March 16, 1977, the court below issued an opinion setting aside the *Order* on the ground that it contravened Section 326 of the Communications Act which prohibits the Commission from censoring radio communications. (App. 45). The opinion of the court was delivered by Circuit Judge Tamm and joined in by Chief Judge Bazelon. A separate concurring opinion was also delivered by Chief Judge Bazelon in which he expressed the view that the *Order* violated the First Amendment as well as the no-censorship provision of Section 326. (App. 64). A dissenting opinion was filed by Judge Leventhal, expressing the view that the *Order* should have been affirmed as a proper exercise

[13] The Commission stated that it "would be *inequitable* for us to hold a licensee responsible for indecent language" broadcast in connection with *live coverage* of an event under circumstances where there "is no opportunity for journalistic editing." (Emphasis added). (App. 43, n. 1). The Commission cautioned licensees, however, that even "under such circumstances" they were to "exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." (*Id.*).

of the Commission's regulatory responsibilities. (App. 91).

SUMMARY OF ARGUMENT

I.

The Commission's *Order,* far from being a narrow ruling directed to certain language "as broadcast," was in fact a broad-brush attempt to set a standard of "decency" applicable to all broadcasters. As the Commission twice stated in its *Order,* its primary purpose was to "review the applicable legal principles and clarify the standards which will be utilized [by the Commission] in considering the public's complaints about the broadcast of 'indecent' language." (App. 7-8, 17, ¶¶ 2 & 15). Further, in response to a request from the Radio Television News Directors Association for clarification of the *Order*'s scope, the Commission refused to limit the *Order*'s proscription against the broadcast of indecent language to the particular circumstances surrounding WBAI's broadcast of the Carlin monologue. Thus, the fact that the Commission's ban on indecent language happened to be articulated in the context of the disposition of a particular complaint does not limit the broad impact of the ban, and the Commission's attempt to limit it to the facts underlying the specific complaint against WBAI is both disingenuous and belated.

The standard of "indecency" adopted by the Commission not only prohibits the broadcast of the Carlin monologue, but also prohibits the unexpurgated broadcast of great works of classical and contemporary literature, including even passages from the *Bible.* Since context is irrelevant under the Commission's definition, political speeches, rallies, news events, and public

affairs programs and documentaries would also be subject to the censoring effect of the *Order*.

II.

The Commission's reliance upon Section 1464 of the Criminal Code (18 U.S.C. § 1464) as authority for its action banning the broadcast of "indecent" language is misplaced. Although Section 1464 prohibits the utterance of "obscene, indecent, or profane language by means of radio communications," the construction given to the Section 1464 term "indecent" in the Commission's *Order* is clearly precluded by this Court's decision in *Hamling* v. *United States,* 418 U.S. 87 (1974) and *United States* v. *12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973). *Hamling* and *12 200-Ft. Reels* clearly establish that when the term "indecent" appears in federal criminal statutes, the term must be construed as subsumed by the legal definition which this Court formulated for the term "obscene" in *Miller* v. *California,* 413 U.S. 15 (1973).

Section 1464 is a criminal statute. Therefore, assuming *arguendo,* that the term "indecent" as used in that section can be construed as having a meaning which is not entirely subsumed by the *Miller* definition of "obscene," the term must, nevertheless, be construed strictly and in a manner consistent with the definition which the courts have given the term in construing Section 1464 and other criminal statutes. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954). The term "indecent" as used in federal and state criminal statutes has been invariably construed as referring to prurient material and utterances. The Commission expressly excludes "appeal to prurient interest" as an element of the definition of the term "indecent" formulated in its *Order*. (App. 15, ¶ 11). Accordingly, the Commission's definition of "indecent" is inconsistent with the definition which the courts have given to the term and thus cannot be sustained.

III.

The Commission's *Order* cannot be sustained on the theory that "unique qualities" of broadcasting provide a justification for the Commission's action banning the broadcast of "indecent" language. Underlying the Commission's reliance upon broadcasting's "unique qualities" as providing a basis for its action is its assumption that certain words can be banned, absolutely, without infringing upon the First Amendment's guaranties. The absurdity of this assumption has been clearly illustrated by this Court's decision in *Cohen* v. *California,* 403 U.S. 15 (1971). The fact that the Commission's *Order* is directed at expression in the broadcast medium does not, as the Commission maintains, render *Cohen* inapplicable to this case. This Court has pointed out that the basic principles of freedom of expression embodied in the First Amendment do not vary from medium to medium. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503 (1952). The "unique qualities" of the broadcast medium relied upon by the Commission as providing a basis for its action do not justify the application of different First Amendment standards in judging the validity of governmental suppression of broadcast expression than are applied in evaluating governmental regulation of expression in other media.

The scarcity of the radio spectrum which is cited by the Commisson as one of broadcasting's "unique qual-

ities" only provides, at most, a basis for governmental action aimed at maximizing First Amendment interests. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). Scarcity cannot provide a justification for the Commission action at issue in this case. That action suppresses expression in the broadcast medium and thereby aggravates, rather than alleviates, the problems created by spectrum scarcity.

The presence of unsupervised children in the audience, another "unique quality" relied upon by the Commission, plainly does not provide a valid basis for the Commission's action. In attempting to protect unsupervised children from exposure to "indecent," but non-obscene, language, the Commission's *Order* mandates that the content of radio and television broadcasts be restricted, at least during time periods when children may be in the audience, to material which is, in the Commission's view, suitable for children. The *Order,* thus, effectively reduces the adult portion of the radio and television audience to hearing and viewing "only what is fit for children." Such sweeping censorship of material based upon its supposed unsuitability for children represents a classic example of unconstitutional overbreadth. *Butler* v. *Michigan,* 352 U.S. 380 (1957).

The Commission's reliance upon *Miller* v. *California,* 413 U.S. 15 (1973) and *Ginsberg* v. *New York,* 390 U.S. 629 (1968) as supporting its contention that its *Order* may be sustained as a valid exercise of governmental power to protect children from exposure to unsuitable material is clearly misplaced. *Miller* and *Ginsberg* stand only for the proposition that the dissemination of "sexually explicit materials" which are both

prurient as to minors and which lack substantial artistic, literary, political or scientific value as to minors may constitutionally be restricted under a narrowly drawn regulation even though the materials are not legally obscene as to adults. Since the Commission's *Order* seeks to ban all "indecent" language without regard to whether it is "sexually explicit" or whether it is prurient and without regard to the context in which it is used, *Miller* and *Ginsberg* are obviously inapposite.

There is no merit to the Commission's contention that its action can be justified on the grounds that it is designed to protect children from being exposed to language which "most parents regard as inappropriate for [children] to hear." Not only is there no evidentiary basis for the Commission's assumption about the type of language which "most parents" would not want their children to hear, but even assuming the Commission's assumption were correct, the Commission's action would be barred as an unconstitutional intrusion into the role of parents in supervising their children's upbringing. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925).

Finally, there is clearly no merit to the Commission's claim that the broadcast of "indecent" language can be banned because radio and television receivers are generally found in the home "where individual rights to privacy are entitled to particular respect." Radio and television broadcasts do not intrude into the privacy of the home; they are invited into the home by the householder who is entirely free to "twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Rowan* v. *Post Office De-*

partment, 397 U.S. 728, 737 (1970). In its *Order,* the Commission has "twisted the dial" for the householder. Such action is the very essence of censorship and thus cannot be sustained.

ARGUMENT

As reflected in the Commission's statement of the "questions presented" (Pet. Br. 2), two distinct questions are presented by this case. The first question is whether the Commission's action banning the broadcast of "indecent," but "non-obscene," language can be sustained as a valid exercise of its responsibility under Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) to regulate broadcasting "in the public interest." The second question is whether the Commission's action constituted a valid exercise of its authority to construe and enforce the prohibition against utterance of "indecent . . . language by means of radio communications" found in Section 1464 of the Criminal Code (18 U.S.C. § 1464). The Commission's brief does not discuss these questions separately, but rather treats the question of its authority to ban broadcasting of "indecent" language "in the public interest" in the context of its discussion of what it perceives to be its authority under Section 1464.[14] Nevertheless, Pacifica believes that the two questions raise substantially different issues requiring different analyses. Accordingly,

[14] In its *Order* (App. 18, ¶ 16), the Commission expressly asserted that the action taken therein could be sustained without regard to Section 1464 of the Criminal Code, as a valid exercise of its responsibility pursuant to Section 303(g) of the Communications Act to "encourage the larger and more effective use of radio in the public interest."

in this brief the Commission's contention that its *Order* banning the broadcast of "indecent" language can be sustained as a valid exercise of its responsibility to regulate broadcasting in the "public interest" will be considered separately from the question of whether Section 1464 empowers the Commission to impose such a ban.[15]

[15] Other important questions, not directly raised by this case, lurk in the Commission's *Order.* Most significantly, a serious question exists as to whether Commission consideration of specific offensive program content in the context of a license renewal or similar administrative proceeding would comply with constitutionally mandated procedural requirements. *See Illinois Citizens Committee for Broadcasting* v. *FCC,* 515 F.2d 397, 403 (D.C. Cir. 1975); Comment, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards,* 84 Harv. L. Rev. 664, 694-99 (1971). In a renewal proceeding the burden of proving that renewal is in the public interest is on the licensee. A licensee accused of broadcasting "indecent" programming must then prove that its programming was not "indecent." The chilling effect on the exercise of First Amendment rights of forcing the citizen to prove his speech is protected has been held to be unconstitutional in a variety of factual settings. *Freedman* v. *Maryland,* 380 U.S. 51 (1965) (state film censorship board must bear burden of proving material is obscene); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958) (state cannot place burden on taxpayer to prove that he is not a criminal syndicalist as a condition of qualifying for a tax exemption). Additionally, censorship or other administrative proceedings regulating speech must make provision for prompt judicial review of findings. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975) (burden of establishing legality of prior restraint must be borne by the state which must initiate judicial proceedings to prove that material is not constitutionally protected); *Blount* v. *Rizzi,* 400 U.S. 410 (1971); *Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Not only is such review not provided for by the Commission's *Order,* but the presence of additional factual issues justifying a Commission decision not to renew a license based, in part, upon a Commission finding that the licensee's programming was "indecent" might effectively preclude *any* judicial review of whether the particular programming was protected. *See, e.g., United Broad-*

I. The Commission's Declaratory Order Cannot Be Construed As A Narrow Application Of Section 1464 To A Specific Set Of Facts.

In order to provide a framework for the discussion of the legal principles applicable to this case, it is necessary to discuss briefly the scope and effect of the Commission's *Order*. The court below found that the *Order* "prohibits the broadcast of seven words at times of the day when there is a reasonable risk that children will be in the audience [and] [t]hus . . . sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be." (App. 60). Based upon this reading of the *Order*, the court below set it aside as "overbroad," noting that "[c]learly every use of these seven words cannot be deemed offensive even as to minors," and as "vague," citing this Court's holding in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970) that "in assessing the requisite capacity of individual choice the age of the minor is a significant factor" and noting that the *Order* "fails to define children" or to "even consider age a significant factor." (App. 60-61).

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casting Co. v. *FCC*, No. 76-1570 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3466 (U.S. Jan. 23, 1978) and *Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). (In *United*, the court declined to review a Commission determination that certain broadcasts claimed by the licensee to be religious in nature contained objectionable material not protected by the First Amendment, and in *Robinson* the court declined to review a Commission determination that certain programming was indecent, holding in both cases that questions of the constitutional validity of the Commission's conclusions that the content of the licensee's programming provided a basis for denying renewal of license did not have to be reached since independent grounds for nonrenewal of license existed.)

The dissenting judge below read the *Order* as holding "only that the language *as broadcast* was indecent and prohibited by 18 U.S.C. 1464." (App. 93-94).

In its brief to this Court, the Commission, relying heavily on the dissenting judge's reading of the *Order*, argues that the intent and effect of the *Order* was only to resolve "a specific complaint" regarding the language used in the Carlin monologue "as broadcast" over WBAI.[16] (Pet. Br. 41-44). It is clear, however, that both the intent and the effect of the *Order* are vastly broader. The *Order* was not issued solely, or even primarily, for the purpose of resolving the specific complaint lodged against WBAI as a result of its broadcast of the Carlin monologue. Rather, as set forth both in the *Order*'s introduction and again in its conclusion, its primary purpose was to "review the applicable legal principles and clarify the standards which will be utilized [by the Commission] in considering the public's complaints about the broadcast of 'indecent' language." (App. 7-8, 17, ¶¶ 2, 15).

The *Order* defined the term "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory

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[16] The Commission did not argue in its brief below that the *Order* was limited to the monologue "as broadcast," and it first advanced its "as broadcast" theory in its Petition for Rehearing and Suggestion for Rehearing en Banc. (App. 117 & 118). While Pacifica believes it is important to a full understanding of this case that the scope of the Commission's *Order* be clearly understood, the legal principles discussed *infra* would render the *Order* invalid even if it could be read in the narrow manner in which the Commission now urges it should be read.

activities and organs.'" (App. 14-17, ¶¶ 11, 12 & 14). Moreover, the *Order* emphasized that "indecent language" as defined therein

> is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15, ¶ 11). Since the *Order* unequivocally states that, at least at times when children may be in the audience, context is utterly irrelevant in determining whether particular language is "indecent," the Commission cannot be heard to argue that the *Order*'s definition of "indecent" was applicable only to the Carlin monologue "as broadcast" over WBAI.[17] Nor can the Commission be heard to argue (Pet. Br. 43-44) that Pacifica somehow acted improperly, and may even have misled the court below as to what this case is

[17] The Commission asserts in its brief (Pet. Br. 45) that the words broadcast by WBAI were "patently offensive by *its* community's contemporary standards." (Emphasis added). This is a serious misrepresentation of the facts of this case. The Commission did not attempt to ascertain whether any of the words used in the Carlin monologue were "patently offensive" according to the contemporary community standards of WBAI's city of license, New York, and the record is entirely silent on this question. Moreover, it is obvious from the *Order* that the Commission was relying on a national standard of "patent offensiveness" which it believed to be susceptible of official notice since it declared the specific words used in the Carlin selection to be indecent as a matter of law. (App. 16-17, ¶ 14).

[18] Although the Commission argued in its brief to the court below that "the lengthy compilation of allegedly prohibited quotations" which Pacifica submitted in an appendix to its brief represented "a serious misinterpretation of the Commission's *Order*," the Commission did not attempt to explain how the materials quoted in Pacifica's appendix could escape the *Order's* proscriptions.

about, when "it placed before the court . . . in a separate appendix a host of literary, dramatic, poetic, and religious works which were allegedly banned by the Commission's ruling" without having first brought the materials listed in the appendix to the Commission so that it could rule on them, independently, to determine whether it "had intended to reach them with its prohibition.'"[19] In any event, although Pacifica did not itself seek reconsideration of the *Order*, the Commission was afforded an opportunity to clarify the *Order*'s scope in the context of a "Petition for Clarification or Reconsideration" filed by the Radio Television News Directors Association ("RTNDA"). In its petition, RTNDA sought

> a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program."

[19] The separate appendix which Pacifica submitted to the court below listed examples of materials containing language within the *Order*'s definition of "indecent." It is reproduced at pages 1a-19a of the Addendum to this brief. This Addendum is merely illustrative of the types of materials affected by the *Order*'s unqualified and unambiguous proscription of the broadcast, without regard to context, of language coming within its definition of "indecent." In view of the fact that the Commission has reproduced for this Court (Addendum to FCC Petition for Certiorari), as it did for the court below, transcripts of broadcasts presented by an educational station in no way involved in this case for the purpose of illustrating "a logical extension of Pacifica's abstract principle" (Pet. Br. 28 n. 23), the Commission cannot be serious in suggesting (Pet. Br. 22 n. 21) that Section 405(a) of the Communications Act (47 U.S.C. § 405(a)) somehow precluded the court below from taking note of the materials listed in Pacifica's appendix.

(App. 42). RTNDA specifically noted that language appearing in the Nixon tapes would be definable as "indecent" under the Commission's standard. (RTNDA Petition at 5-6.) In response to the RTNDA petition, the Commission noted (App. 43-44) that its *Order* had

> intimated that such language could be broadcast —in a news or public affairs program or otherwise —*when the number of children in the audience was reduced to a minimum,* if sufficient warnings were given to unconsenting adults and if in the context used the language had serious literary, artistic, political or scientific value[.]

(Emphasis added). However, the Commission declined to discuss the scope of the *Order* further "in the absence of a concrete factual context . . . ." (App. 44). Moreover, while the Commission observed in a footnote that it "would be *inequitable* for us to hold a licensee responsible for indecent language" broadcast in the context of live public events where no opportunity existed "for journalistic editing" (App. 43 n. 1) (emphasis added), it pointedly refused to *rule* that live broadcasts were outside its definition of "indecent" and, implicitly if not explicitly, did rule that broadcasts of *recorded* news and public events were prohibited if they contained the offending words. The Commission's treatment of the RTNDA petition leaves no doubt that the Commission intended the *Order* to be understood as formulating a definition of "indecent" which would be of general applicability (even to news and public affairs programs), not one that was applicable only to the specific broadcast referred to it by a specific complaint.

As the court below recognized (App. 54), the *Order* "proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."[20] The *Order* also proscribes the broadcast of the words in question in the context of the White House tapes,[21] in the course of covering a political speech, rally, or news events (except where coverage is live and circumstances render "journalistic editing" impossible), in the context of a public affairs documentary, or in the context of any other news or public affairs program.[22] Moreover, although the Commis-

[20] Examples of the use of the words defined by the Commission as "indecent" in the *Bible* and in literary works are collected in the Addendum hereto at 1a-12a. These examples are presented for illustrative purposes only and do not purport to be exhaustive of the field.

[21] Examples of the use of the words in question in the context of the Nixon tapes are set forth in the Addendum hereto at 12a-13a.

[22] Examples of the use of the words in question by newspapers and magazines in the course of reporting news stories and in articles dealing with social or political issues are set forth in the Addendum hereto at 13a-19a. The news story (Addendum at 13a-14a) which appeared on the front page of the March 19, 1975 edition of the Dayton, Ohio, *Journal Herald* and which included expurgated excerpts from an affidavit recounting the events leading up to the fatal shooting of a Treasury agent by a fellow agent is but one illustration of a situation where a responsible journalist could reasonably conclude that it was necessary and appropriate to use what is often regarded as one of the most offensive of words in reporting the news. The journalistic considerations and judgments which led to the decision by the editor of the *Journal Herald* to publish excerpts from the affidavit, "including in one instance the raw vulgarity used by a man blind with rage" because he believed the incident presented "a lesson that every man, woman and child should perceive in all its dimen-

sion's action affects a wide range of political, artistic, and literary expression, its impact is likely to fall most heavily upon expression by persons belonging to groups and subcultures within American society who may not share the dominant culture's view of which words or expressions are "acceptable" [23] and who, in order to express themselves, use words which may be regarded as offensive by persons from different socio-economic backgrounds.[24] Such use may arise from an

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sions," were discussed in an article by *Washington Post* Associate Editor Charles B. Seib entitled "Dirty Words" which appeared on the editorial page of that newspaper on April 16, 1975 and in an article entitled "Ohio: Printing The Obscenity" which appeared in the July/August 1975 edition of the *Columbia Journalism Review* at pp. 15-17. Mr. Seib's article is reproduced in the Addendum hereto at 17a-19a.

[23] *See Cohen* v. *California*, 403 U.S. 15, 25 (1971) where this Court observed that, "while the particular four-letter word being litigated here ['Fuck the Draft'] is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."

[24] Such groups and subcultures may be separated from the dominant culture on the basis of any number of factors, *e.g.*, by age, by race, by income, by ethnic origin. For example, the use by some blacks of certain language considered taboo in conventional, white society has been the subject of academic analysis. *See* Carolyn Fitchett Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," printed in *Language and Linguistics Working Papers No. 5* (Georgetown Univ. Press, 1972) at 76-94. In discussing the use in black oral poetry of "words and expressions considered taboo in the dominant culture," Ms. Bins observes that "what is 'acceptable' must be determined by the community in which the speech event takes place, not by an investigator's own cultural values about its quality or acceptance," and she points out that "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." *Id.* at 82. *See also* Dillard, *Black English* (1972); Jackson, *Get Your Ass in the Water and Swim Like Me* (1974); Labov, *Language in the Inner City: Studies in the Black English Vernacular* (1972).

innocent reliance on the vocabulary of one's peer group, or it may form part of an intentional effort to challenge the sensibilities or underlying concepts of the dominant culture. Whatever may be the case, the Commission's action withdraws these words from the available broadcast vocabulary of these groups.

II. Section 1464 Of The Criminal Code Does Not Empower The Commission To Regulate Expression Which Is Not Obscene.

The Commission contends that Section 1464 of the Criminal Code (18 U.S.C. § 1464) confers upon it both the authority and the affirmative responsibility to excise from the public airwaves offensive, but non-obscene, language. The Commission's reliance upon Section 1464 is based upon the fact that Section 1464 proscribes the utterance of "obscene, indecent, or profane language by means of radio communication" [25] and its belief that this Court's decisions in *Hamling* v. *United States*, 418 U.S. 87 (1974) and *United States* v. *12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) do not preclude the formulation of a definition of the term "indecent" tied to what the Commission perceives to be the "unique qualities" of the broadcast medium which is separate and distinct from the meaning this Court has given to the term "obscene."

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[25] Although the Commission states in its brief (Pet. Br. at 40) that Section 1464 "applies only to the broadcasting media, which for [a] variety of reasons . . . are different from other modes of expression and therefore warrant different treatment," Section 1464 actually applies to all forms of communications by radio. Thus, if the Commission's definition of "indecent" as used in Section 1464 were sustained, it would be applicable to citizens band, shipboard, and business radio, point-to-point communications, and all other forms of communications by radio, regardless of whether the particular form of communication possessed any of the "unique qualities" which the Commission attributes to broadcasting.

The discussion which follows will show that: (1) *Hamling* and *12 200-Ft. Reels* do preclude the Commission from construing "indecent" as meaning anything other than "obscene," and (2) even assuming, *arguendo,* that "indecent" could be construed as having a meaning which is not entirely subsumed within the term "obscene," the definition of "indecent" set out in the Commission's *Order* which rests solely on the presumed patent offensiveness of language describing "sexual or excretory activities [or] organs" is inconsistent with the definition which the term has been given through the process of judicial interpretation and, thus, cannot be sustained. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954).

A. *Hamling* AND *12 200-Ft. Reels* REQUIRE THAT "INDECENT" AS USED IN SECTION 1464 BE CONSTRUED AS MEANING OBSCENE.

This Court has twice held that where the term "indecent" is used in a federal statute to describe types of expression which will subject persons to criminal penalties, the term must be construed as referring only to " 'patently offensive representations or descriptions of that specific "hard core sexual" conduct given as examples in *Miller* v. *California* [413 U.S. 15 (1973)].' " *Hamling,* 418 U.S. at 114, *quoting 12 200-Ft. Reels,* 413 U.S. at 130 n.7.

Hamling, a case decided *after* the series of intermediate court cases cited by the Commission (Pet. Br. 29) as having "indicated that 'indecent' had a separate and distinct meaning from 'obscene' in Section 1464," involved convictions under Section 1461 of the Criminal Code (18 U.S.C. § 1461) which prohibits the mailing of material which is "obscene, lewd, lascivious, indecent, filthy or vile." Those convictions were challenged on the grounds that the section was unconstitutionally vague because it neither referred by its terms to material involving the specific types of explicit sexual conduct defined as obscene in *Miller* v. *California,* 413 U.S. 15 (1973), nor had it been construed as applying only to material involving such conduct. The opinion of the Court in *Hamling* pointed out that even prior to *Miller* the various terms employed in Section 1461 had been "authoritatively construed [by the Court] in a manner consistent with *Miller.*" 418 U.S. at 112. The Court further observed:

> *Miller* undertook to set forth examples of the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way . . . , and went on to say that no one could be prosecuted for the "sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

Id. at 113-14. The opinion then referred to the Court's statement in *12 200-Ft. Reels,* 413 U.S. at 130 n. 7, making clear the Court would construe the terms "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" when used in federal statutes describing criminal conduct as referring only to "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California,*" and the Court concluded "[w]e now so construe the companion provision in 18 U.S.C. § 1461 . . . ." [26] 418 U.S. at 114.

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[26] In *United States* v. *12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), the Court had referred to the use of "the words

In view of *Hamling* and *12 200-Ft. Reels,* the Commission's contention that "indecent" as used in Section 1464, "a companion provision" to Sections 1461 and 1462, can be construed, consistently with the Constitution, as making it a crime to engage in non-obscene expression cannot be sustained. While the Commission is technically accurate in pointing out that neither *Hamling* nor *12 200-Ft. Reels* "make any reference whatsoever to Section 1464 or to radio communication" (Pet. Br. 27-28), this fact is obviously irrelevant. In both cases, this Court's concern was with the problem of how to give the term "indecent" and other terms used in federal statutes to describe expression which could subject persons to criminal penalties a sufficiently precise and limited meaning so as to meet First Amendment and due process requirements. This problem of precision of definition does not vary from medium to medium, and the "limiting definition" which the Court gave to the term "indecent" was clearly intended to apply to all federal criminal statutes employing that term.[27]

'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462." 413 U.S. at 130 n. 7.

[27] In a recent decision setting aside a jury conviction for uttering "indecent" language over a citizens band radio in violation of Section 1464, the United States Court of Appeals for the Seventh Circuit held, based upon *Hamling,* that the term "indecent" as used in Section 1464 has the same meaning as the term "obscene." *United States* v. *Simpson,* 561 F.2d 53 (7th Cir. 1977). The fact that the "term 'indecent' in 18 U.S.C. 1464 was . . . construed as synonymous with 'obscene' " in *Simpson* was cited in the Senate Judiciary Committee's report relative to the proposed Criminal Code Reform Act (S. 1437) which would transfer Section 1464 to the Communications Act without substantive change. Report of the Committee on the Judiciary to Accompany S.1437, 95th Cong. 1st Sess., at 855 n. 100 (1977).

B. Statutory Construction Forecloses Any Definition Of "Indecent" Which Does Not Include The Element Of Appeal To Prurient Interest.

Assuming, *arguendo,* that the term "indecent" as used in Section 1464 can constitutionally be construed as having a meaning that covers material that is not legally "obscene," the Commission's definition of "indecent" still could not be sustained. Section 1464 is a criminal statute. Therefore, the Commission is clearly bound by the definition which the courts have given to "indecent" when it construes and applies that term. *FCC* v. *American Broadcasting Co.,* 347 U.S. 284 (1954).

The principles of statutory construction set forth in *American Broadcasting Company* are directly applicable to this case. The *American Broadcasting Company* case involved the validity of rules which the Commission had adopted banning the broadcast of give-away programs on the grounds that such programs violated Section 1304 of the Criminal Code (18 U.S.C. § 1304) which prohibits the broadcast of lotteries. This Court recognized that the Commission had the power, concurrently with the Department of Justice, to enforce Section 1304 and stated that it was, therefore, altogether proper for the Commission to adopt "interpretive regulations defining the prohibited conduct with greater clarity." 347 U.S. at 289-90 n. 7. The Court held, however, that the Commission's power to adopt interpretive rules is limited by the scope of the statute and that "[u]nless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by

agency action." *Id.* at 290. Being unable to find any guidance in the terms of the statute or its legislative history as to whether the give-away programs involved sufficient consideration to bring them within the scope of the statute, the Court found it necessary to look to "American decisions, both judicial and administrative, construing comparable antilottery legislation." *Id.* at 292. Based upon a review of such decisions, the Court concluded that "it would be stretching the statute to the breaking point to give it an interpretation that would make such programs [as affected by the rules in question] a crime." *Id.* at 294. The Court then pointed out that acceptance of the Commission's construction of Section 1304 which lacked case support "would do violence to the well-established principle that penal statutes are to be construed strictly." *Id.* at 296. It, therefore, held that, despite the Commission's belief that give-away programs "should be struck down as illegal devices appealing to cupidity and the gambling spirit," the Commission had "overstepped the boundaries of interpretation and hence [had] exceeded its rule-making power" by attempting to deal with such programs through "administrative expansion of § 1304." *Id.* at 296-97.

Applying the principles of *American Broadcasting Company* to the instant case, it is clear that the Commission "has overstepped the boundaries of interpretation and hence has exceeded its . . . power" by formulating a definition of the term "indecent" as used in Section 1464 which eliminates entirely the element of "appeal to prurient interest." The term "indecent" has been employed in federal and state statutes regulating material and utterances of an obscene or patently offensive nature since at least the latter part of the

last century. Over the years, the federal and state courts have had frequent opportunities to consider the meaning of the term as used in such statutes. The courts have invariably held that "indecent" refers to material which is of such a lewd or lascivious nature as to have a tendency to excite libidinous thoughts or deeds—*i.e.*, material which is now generally decribed as "appealing to prurient interest"—as distinguished from material that is merely crude, coarse, vulgar, profane or opprobrious.[28] The Commission's *Order* un-

[28] *See, e.g., Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482-83 (1962); *Roth* v. *United States*, 354 U.S. 476 (1957); *Dunlop* v. *United States*, 165 U.S. 486, 500-01 (1897); *Swearinger* v. *United States*, 161 U.S. 446, 450-51 (1896); *Walker* v. *Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975); *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799, 803 (1st Cir. 1960); *United States* v. *Keller*, 259 F.2d 54 (3rd Cir. 1958); *Duncan* v. *United States*, 48 F.2d 128, 132-33 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931); *United States* v. *Dennet*, 39 F.2d 564 (2d Cir. 1930); *Knowles* v. *United States*, 170 Fed. 409 (8th Cir. 1909); *United States* v. *Davidson*, 244 Fed. 523, 530-31 (N.D.N.Y. 1917); *United States* v. *Journal Co.*, 197 Fed. 415, 417-18 (E.D. Va. 1912); *United States* v. *Males*, 51 Fed. 41 (D. Ind. 1892); *In re Giannini*, 72 Cal. Rptr. 655, 446 P.2d 535 (1968); *State* v. *Locks*, 97 Ariz. 148, 397 P.2d 949 (1964); *State* v. *Christine*, 239 La. 259, 118 So. 2d 403, 408 (1960); *State* v. *Settle*, 90 R.I. 195, 156 A.2d 921 (1959); *Sunshine Book Co.* v. *McCaffrey*, 112 N.Y.S. 2d 476, 483 (Sup. Ct. 1952); *People* v. *Wepplo*, 78 Cal. App. 2d 959, 178 P.2d 853, 855 (1947).

Duncan v. *United States, supra*, involved an appeal from a conviction for broadcasting "obscene, indecent and profane" language over a radio station in violation of Section 29 of the Federal Radio Act of 1927 (47 U.S.C. § 109), the section from which Section 1464 is directly derived. Based upon a review of cases interpreting other federal statutes aimed at controlling obscene and indecent material, the *Duncan* court held that language which "is vulgar, scurrilous, and indecent in the popular sense of the term . . . is not obscene or indecent within the meaning of those terms as universally applied in the administration of the criminal law with reference to the use

equivocally declares that the definition of "indecent" language formulated therein "is distinguished from obscene language in that . . . it lacks the element of appeal to the prurient interest . . . ." (App. 15, ¶ 11).[29]

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of obscene and indecent language" unless the language "would arouse lewd or lascivious thought in the minds of those hearing or reading" it. *Id.* at 132. Although the Commission notes that a subsequent case rejected an argument that *Duncan* had equated indecency with obscenity for purposes of Section 1464 (Pet. Br. 6 n. 3), the Commission makes no attempt to reconcile with *Duncan* a definition of "indecent" which does not include prurience.

[29] In *Eastern Educational Radio*, 24 FCC 2d 408, 412-13, ¶¶ 10 & 13 (1970), the Commission defined "indecent" for the purposes of carrying out its responsibilities under Section 1464 and its obligation to regulate broadcasting in the public interest as referring to material which is both "(a) patently offensive by contemporary community standards; and (b) . . . utterly without redeeming social value." In its *Order*, the Commission expressly abandoned this definition which was based upon two of the three elements of the obscenity test which this Court had formulated in a line of cases culminating with *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) and substituted a definition tied only to the single element of patent offensiveness. (App. 14-15, ¶ 11). The Commission explained in its *Order* that it had taken this action in view of the fact that "the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency" in *Eastern Educational Radio*. (App. 7, ¶ 2). The Commission's reliance on *Miller* was clearly misplaced. In *Miller*, the Court set forth "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." 413 U.S. at 29. The Court emphasized that the permissible scope of regulation must be limited to materials "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Significantly, the Commission in its brief to this Court no longer cites *Miller* as providing a justification for its having eliminated the requirement of "utterly without redeeming social value" from its definition of "indecent." But the Commission also makes no effort whatsoever to justify the elimination of that requirement, or its equivalent formulation as set forth in *Miller*.

Accordingly, since the Commission's definition of the term "indecent" is utterly without "support in the decided cases," Section 1464 cannot provide a basis on which the Commission's *Order* can be sustained.

III. The Commission's Order Cannot Be Sustained As A Legitimate Exercise Of Its Authority To Regulate Broadcasting In The "Public Interest."

Although the arguments advanced by the Commission in its brief to this Court are substantially the same as those which it relied upon in its original *Order*, the Commission's position has shifted in one notable respect. In its *Order*, the Commission maintained that its authority to regulate "indecent" language was derived from two independent statutory provisions—Section 1464 of the Criminal Code (18 U.S.C. § 1464) and Section 303(g) of the Communications Act of 1934 (47 U.S.C. § 303(g)), as amended, the latter of which charges the Commission with the affirmative duty to "encourage the larger and more effective use of radio in the public interest." (App. 11 & 18, ¶¶ 7 & 16). As originally developed in its *Order*, the Commission's argument was as follows: First, that the existing judicial interpretation of the term "indecent" as used in Section 1464 did not preclude the Commission from giving that term a separate and distinct meaning from the terms "obscene" and, secondly, that "unique qualities" or "peculiar characteristics" of the broadcasting medium provided a basis for action by the Commission to expunge "indecent" language under the "public interest" standard of Section 303(g). In its brief to this Court, the Commission no longer places direct reliance on Section 303(g) as authority for its action. Rather, it now urges that the "unique qualities" of the broadcast media provide a basis for its construing the

Section 1464 term "indecent" in the manner set forth in its *Order*. Thus, while ostensibly abandoning direct reliance on Section 303(g), the Commission persists in relying upon the "public interest" arguments which it originally made on the basis of that section to support its contentions that its authority to regulate "indecent" language is derived from Section 1464.[30] Accordingly, the question of whether "public interest" considerations justify the Commission's action warrants separate consideration. The discussion which follows will show that the Commission's action cannot be sustained as a valid exercise of its obligation to regulate broadcasting in the public interest.

A. The Commission's Action Is Predicated Upon The Mistaken Belief That Specific Words Can Be Banned Without Restricting Freedom Of Expression.

The fundamental defect in the Commission's *Order* is that it is predicated upon the Commission's mistaken belief that certain words can be absolutely banned from the airwaves without limiting or inhibiting in any way the free expression in the broadcast medum.

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[30] The central role which the "public interest" standard plays in the Commission's theory of this case is evident from the fact that arguments predicated on the "public interest" dominate the Commission's brief (Pet. Br. 18 n. 19, 25, 30, 32, 34, 37-39, 45). It is further underscored by the Commission's framing of the questions presented for review. The first of the two questions identified by the Commission (Pet. Br. 2) is whether

> the peculiar characteristics of the broadcast media and the requirement that broadcast licensees operate their stations consistently with the public interest justify the prohibition of "indecent" language as a separate category from "obscene" language, for purposes of regulatory action.

In fact, while asserting that it was obligated by Section 303(g) to take action to prevent the "widespread use of indecent language on the public's airwaves" from "critically impair[ing] broadcasting as an effective mode of expression and communication," the Commission insisted that it was not its intention "to stifle robust, free debate on any of the controversial issues confronting our society" or to "modify [its] previous decisions recognizing broadcasters' broad discretion in the programming area." (App. 11 & 18, ¶¶ 7 & 16). The absurdity of the Commission's contention that it can ban particular words from artistic expression is readily apparent from even a superficial consideration of the range of expression affected by the Commission's *Order*.[31]

The incompatibility of any absolute ban on the use of specific words, no matter how offensive, with the First Amendment was made clear in *Cohen* v. *California*, 403 U.S. 15 (1971), and in a consistent line of cases since *Cohen*.[32] In these cases, this Court has emphasized that the Constitution forecloses governmental action which restrains or penalizes the public use of any particular word, or class of words, solely on the grounds of offensiveness. Since the question considered

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[31] *See, e.g.*, the compendium of literary, political and artistic works utilizing words proscribed by the *Order* set out in the Addendum to this brief.

[32] *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973); *Papish* v. *Board of Curators*, 410 U.S. 667 (1973); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *cf. Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

by this Court in *Cohen* is virtually identical to the question presented in this case, the Court's discussion of the constitutional considerations underlying its resolution of *Cohen* is of particular relevance.

Cohen involved a California statute which made it an offense for anyone to "maliciously and willfully disturb the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." The conduct complained of was Cohen's action in walking through a corridor in the Los Angeles County Courthouse wearing a jacket on which were written the words "Fuck the Draft." People present in the corridor included women and children. 403 U.S. at 16. This Court stressed at the outset of its decision that "[t]he conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public," *id.* at 18 (emphasis in original), and it pointed out that in the context in which the words had been used it was obvious that they could not be punished on the theory that they were obscene or that they were "fighting words." *Id.* at 20. The Court then considered whether Cohen's conviction could be sustained either on the theory that "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers," *id.* at 21, or on the alternative ground that "California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse" upon a "general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* at 22-23. The

Court held that the State's action could not be sustained on either of these theories."

The Court rejected the State's contention that the use in public of offensive language could be proscribed in order to protect the sensibilities of persons who might otherwise be unwittingly exposed to it, stating:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.
>
> In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles Courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.

Id. at 21. This Court's rejection of the theory that there was a sufficient governmental interest in maintaining "a suitable level of discourse within the body

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[23] The Court also considered and rejected as "plainly untenable" the theory that the use of a particular word could be proscribed because of the likelihood that its utterance would provoke a violent reaction. *Id.* at 23. The broadcast by a radio station of offensive words obviously cannot, under any conceivable circumstances, constitute the sort of "menacing" "verbal assault" that Justice Powell has suggested might be proscribed under a properly framed law as being tantamount to "fighting words." *Compare* the dissenting opinions of Justice Powell in *Plummer* v. *City of Columbus*, 414 U.S. 2, 3 (1973) and *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 903 (1972) *with* the concurring opinions of Justice Powell in *Eaton* v. *City of Tulsa*, 415 U.S. 697, 700 (1974) and *Lewis* v. *New Orleans*, 415 U.S. 130, 134 (1974).

politic" to justify the proscription of the "unseemly expletive" in question was expressly based upon "the usual rule that governmental bodies may not prescribe the form or content of individual expression" unless the expression falls "within one or more of the various established exceptions" to this basic rule—*e.g.*, obscenity, "fighting words," invasion of privacy interests in an intolerable manner. *Id.* at 23-24. Although the reversal of Cohen's conviction was explicitly based upon the absence of any compelling governmental interest which could justify the regulation of offensive speech, this Court also based its decision on "certain more particularized considerations" which have long been held to bar governments from imposing any restrictions on expression based upon considerations of decency, morality or similarly subjective criteria. *Id.* at 25-26.

First, this Court noted that the principle asserted by California in support of Cohen's conviction is "inherently boundless" in that it presents no readily ascertainable general principle for distinguishing the word written on Cohen's jacket from any other offensive word and thus, if the State's justification for its action were sustained, it would leave the State free "to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[34] *Id.* at 25. Second, this Court pointed out that it could not

[34] This Court has consistently struck down as unconstitutionally boundless all similar attempts at the regulation of expression in the interest of protecting public decency, morality, or spirituality. *See, e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Papish* v. *Board of Curators*, 410 U.S. 667 (1973); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Holmby Productions, Inc.* v. *Vaughn*, 350 U.S. 870 (1955); *Commercial Pictures Corp.* v. *Regents*, 346 U.S. 587 (1954); *Gelling* v. *Texas*, 343 U.S. 960 (1952); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Winters* v. *New York*, 333 U.S. 507 (1948); *Musser* v. *Utah*, 333 U.S. 95 (1948).

> overlook the fact . . . well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 25-26.[35] Finally, this Court noted, *id.* at 26, that were it to

> indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process[,] . . . governments might soon seize upon the censor-

[35] Decisions of this Court both prior to and since *Cohen* firmly establish that it is not possible to uphold any regulation which sweeps within its ambit speech which involves an emotive element which may shock or offend the sensibilities of some unsuspecting hearers, but which does not threaten any more important societal interest than the protection of people's sensibilities. *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

ship of particular words as a convenient guise for banning the expression of unpopular views.[36]

The fatal defect in the Commission's *Order* is that it totally ignores the lesson of *Cohen*. In attempting to cleanse broadcast speech to a point where it will be palatable to the most sensitive of listeners, the Commission has formulated a definition of "indecent" which is as "inherently boundless" as the proscription of "offensive conduct" struck down in *Cohen*. Not only does the Commission's definition of "indecent" fail to present a readily ascertainable principle for distinguishing the seven words used in the Carlin monologue from other offensive words, but once there is an acceptance of the rationale of protecting the sensibilities of the public which underlies the Commission's action, there is no readily ascertainable principle which would prevent the Commission from acting to protect the public from any other forms of expression which might offend. That the *Order* does not present a readily ascertainable standard for judging which words come within its definition of "indecent" is conceded by the Commission itself when it argues (Pet.

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[36] The impossibility of imposing a flat ban on particular words without simultaneously suppressing the expression of ideas has been illustrated in a number of court decisions considering governmental attempts to regulate the very sort of words proscribed by the Commission's *Order*. *See, e.g., Bazaar* v. *Fortune*, 476 F.2d 570, *modified per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960); *Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); *Lindros* v. *Governing Board*, 9 Cal. 3d 524, 510 P.2d 361, *cert. denied*, 414 U.S. 1112 (1973).

Br. 21 n.21 & 43-44) that the court below erred in considering the effect of the *Order*, on materials other than the Carlin monologue and suggests that, since the *Order* itself does not provide sufficient guidance to enable licensees to determine which words come within its definition of "indecent," licensees should parade every questionable word before the Commission for its *nihil obstat imprimatur*. A position more clearly in contravention of the "no censorship" provision of Section 326 of the Communications Act and the First Amendment to the Constitution can hardly be imagined.

B. The "Unique Qualities" of the Broadcast Medium Do Not Provide A Basis On Which To Sustain The Commission's Action.

The Commission states that it is not unmindful of "*Cohen* . . . and its progeny" but contends that *Cohen* and the cases following it are distinguishable from the instant case because they "did not deal with the broadcast media, which for the reasons articulated by the Commission require the recognition of other conflicting interests." (Pet. Br. 46-47). This contention rests on the Commission's belief that there are "unique qualities" of radio which permit expression in the broadcast media to be subjected to different First Amendment standards than are applicable to expression in other media. This "variable impact" argument is directly at odds with this Court's teaching that although "[e]ach method of [expression] tends to present its own peculiar problems[,] . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). *Accord, South-*

eastern Promotions, Ltd. v. *Conrad,* 420 U.S. 546, 557-58 (1975). Neither *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) nor *Capital Broadcasting Company* v. *Mitchell,* 333 F. Supp. 582 (D. D.C. 1971), *aff'd sub nom. Capital Broadcasting Company* v. *Acting Attorney General,* 405 U.S. 1000 (1972), the two cases primarily relied upon by the Commission as providing support for its "variable impact" argument, is inconsistent with the doctrine just quoted and, thus, neither case supports the Commission's position.

Red Lion held that the Commission's Fairness Doctrine, requiring broadcasters who express one point of view on controversial issues to provide time for the expression of responsible opposing points of view, does not violate the First Amendment. The Commission's general assertion that this principle somehow authorizes the Commission to carve out such exceptions from the First Amendment as it deems necessary or appropriate is totally groundless. Noting the limited availability of spectrum space, this Court balanced the interest of the listening public in receiving diverse viewpoints against the interest of the broadcaster in selecting the material to be broadcast and preferred the former. The Court specifically based its holding on the need for achieving the broadest possible allocation of a scarce resource. In essence, the Court was making a departure from the application of the First Amendment to other media where scarcity is not a factor in order better to achieve the Amendment's objectives in a medium where scarcity is inevitably present. The Commission's regulatory authority in that regard is not unlike that permitted local governments in administering the use of streets and parks. Because these resources are limited, they are held in trust for the public by the government, which may promulgate regulations to accommodate competing interests in their use. The government may issue permits for the use of public property or may, in the proper circumstances, forbid the use of particular locations altogether for the purposes of speech, but any regulation which it employs must be *neutral* with respect to the content of speech. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969). *See also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 554-55 (1975). Likewise, any action taken by the Commission which affects constitutionally protected speech must be neutral as to specific content. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 162-63 (1973) (Douglas, J., concurring)."

Red Lion and the scarcity rationale on which this Court's decision in that case was based do not by any means constitute blanket authorization for the Commission to ignore Section 326 of the Communications Act and promulgate rules regulating content in the "public interest." The situation involved in *Red Lion* was vastly different from the situation here. *Red Lion* indicates that spectrum scarcity justifies only the requirement that broadcasters afford opportunity for the presentation of conflicting views on controversial issues of public importance. The instant *Order*, however, represents a classic case of censorship, a *limiting* of the material which will gain access to the pub-

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[37] The Commission's action is not a neutral "time, place or manner" regulation, since the factor triggering the proscription, the "operative distinction," is the language, the very content, of the material to be broadcast. *Cf. Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

lic airwaves. The Supreme Court explicitly recognized this distinction in *Red Lion:*

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.

395 U.S. at 396. Thus, whatever greater measure of governmental regulation of broadcasting may be permissible relative to other media under the *Red Lion* "scarcity" rationale, that rationale cannot justify the Commission's action which serves to lessen the number of available voices, and thus aggravates, rather than alleviates, the problem of scarcity.

Capital Broadcasting similarly offers the Commission no support. *Capital Broadcasting* involved a challenge by broadcasters to a federal law which prohibited the broadcast advertising of cigarettes. *See* 15 U.S.C. § 1335. A majority of the three-judge district court convened to hear the case rejected the broadcasters' First Amendment claims, finding that nothing more than commercial speech was involved. 333 F. Supp. at 584-85.[38] The majority, on the basis of its conclusion that only unprotected commercial speech was being abridged, specifically stated that "Congress has the

[38] *Capital Broadcasting* was decided prior to this Court's recent decisions which appear to elevate "commercial speech" to a protected status. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977).

power to prohibit the advertising of cigarettes in *any* media." *Id.* at 584 (emphasis added). Having determined that the First Amendment did not bar Congress from prohibiting *all* cigarette advertising, the court then considered the question of whether Congress could, under the Fifth Amendment, properly limit application of such a prohibition to only the broadcast medium, rather than all media. The court found that Congress had a rational basis for so distinguishing between different media. The question presented here, however, is different. In this case, the Commission's action fails the threshold test—whether the action would be unconstitutional under the First Amendment if applied to any medium. Thus, the holding in *Capital Broadcasting* is inapposite to this case."

[39] Although in a footnote to its brief (Pet. Br. 30 n. 24), the Commission cites six cases in addition to *Red Lion* and *Capital Broadcasting* as providing support for its proposition that "this Court has recognized, in a long line of cases, that broadcasting is different from other media of communications for some regulatory purposes," only *Red Lion* and *Capital Broadcasting* actually provide any independent analysis of the scope of permissible governmental regulation of broadcasting. The remaining cases cited in the Commission's footnote 24 provide no analysis relative to the issue at hand. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) and *Buckley* v. *Valeo*, 424 U.S. 1 (1976) merely cite *Red Lion* for the proposition that the obligations imposed on broadcast licensees by the Commission's Fairness Doctrine are consistent with the First Amendment. Neither *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) nor *Mills* v. *Alabama*, 384 U.S. 214 (1966) even refers to the regulation of broadcasting. Both cases relate to state statutes, found by this Court to be unconstitutional, which sought to impose upon newspaper publishers obligations comparable to those of the Commission's Fairness Doctrine and personal attack rules. *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), wherein the Court found certain restrictions imposed by a bar association on advertising by attorneys to be unconstitutional, cites *Capital* without discussion. Similarly,

In addition to its assertion of general authority, arising particularly from the scarcity of radio spectrum space, to ignore traditional dictates of the First Amendment, the Commission cites three further "peculiar characteristics" of broadcasting which, it asserts, justify its ban on "indecent" language. These characteristics are: (1) the frequent presence of unsupervised children in the audience; (2) the fact that radio enters the privacy of the home; and (3) the fact that unconsenting adults may tune in a station without warning that offensive language may be broadcast. None of these considerations distinguishes the broadcast medium from other media in any way which justifies the application of a special First Amendment standard to this case.

(1) *Presence of Children in the Radio Audience*

The argument advanced most insistently by the Commission is that the prohibition of non-obscene language may be justified on the basis of the frequent presence of unsupervised children in the radio audience—a "peculiar characteristic" of the medium, according to the Commission—and the perceived societal interest in avoiding "exposure of children to language which most parents regard as inappropriate for them to hear." (App. 14, ¶ 11). In so arguing, the Commission has misinterpreted the First Amendment principles applicable to the evaluation of material with respect to minors, has misconceived the nature of the relation-

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Pittsburgh Press Co. v. *Human Relations Comm'n*, 413 U.S. 376 (1973), wherein this Court upheld an ordinance prohibiting newspapers from classifying help wanted advertisements by sex, cites *Capital* without substantial elaboration.

ship between the parent and state and finally has offered no evidence tending to show the validity of the statements of "fact" upon which it relies. More fundamentally, however, the Commission has ignored a basic aspect of First Amendment doctrine—the evil of overbreadth.

(a) The Overbreadth of the Commission's Standard Will Reduce the Content of Radio and Television to the Level of Children

The Commission insists that its action was not overbroad. But it fails to perceive that, although its regulation was intended to protect children, the effect of the regulation is to prohibit, *absolutely*, the dissemination of material because it might come into contact with children. Such complete censorship of material based on its presumed unsuitability for children is a classic example of unconstitutional overbreadth. This Court has recognized the danger of such overbreadth in overturning a state statute absolutely forbidding the publication, sale or distribution of books and other materials which were inappropriate for minors:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . .
>
> . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.

Butler v. *Michigan,* 352 U.S. 380, 383-84 (1957). *Accord, United States* v. *Pellegrino,* 467 F.2d 41 (9th Cir. 1972); *United States* v. *Levine,* 83 F.2d 156 (2d Cir. 1936).[40] If the Commission's *Order* were to be up-

[40] The Commission makes no effort in its *Order* or elsewhere to show that the radio and television audience is ever composed exclusively or even predominantly of children. Nor does it attempt to show the relative composition of radio and television audiences as between adults and children during various portions of the day. The well known facts are that radio and television audiences are in a constant state of flux. There is no period of the day or night when audiences do not include substantial numbers of adults and, *per contra,* there are few, if any, time periods which do not have some children in the audience. Indeed, the Fall, 1976 RADAR Report on Radio Usage, prepared by Statistical Research, Inc., on the basis of nation-wide surveys conducted in March-April, 1976 and September-October, 1976, estimates that, during an average day, more than 2,900,000 minors between the ages of 12-17 listened to the radio at some time between the hours of midnight and 6:00 a.m. Statistical Research, Inc., *Supplemental Report on Radio Usage,* 1 (Fall, 1976). The RADAR Report, which breaks each day into five "dayparts," further estimates that while, of all the dayparts, the audience of 12-17 year olds was least during the midnight-6:00 a.m. daypart, the next *lowest* daypart in terms of that particular audience was 10:00 a.m.-3:00 p.m., the period during which the Carlin monologue was broadcast by WBAI. *Id.* With respect to television, the Arbitron Television audience estimates for the New York market —the market in which WBAI is located—compiled on the basis of surveys taken in November, 1977, indicate that more than 300,000 minors between the ages of 2-17 were in the New York television audience during an average quarter-hour period between 11:30 p.m.-1:00 a.m., Monday through Friday. Arbitron Television, *Audience Estimates in the Arbitron Market of New York,* 4, 9-11 (November, 1977). Of these, more than 75,000 were estimated to be between the ages of 2-11. *Id.* Moreover, the RADAR Report estimates that, on an average day, listeners in the 12-17 year old age group are most likely to be listening to radio in the home, where parents will have a far greater opportunity to control what their children hear than they will to control what their children are exposed to on the street or in the classroom or library. *Supplemental Report on Radio Usage, supra* at 17-19. Of course, television sets

held, its substantial overbreadth would similarly assure the lowering of the content of all radio and television broadcasts to the level of children, a result which is constitutionally impermissible.

Without even citing *Butler,* the Commission argues that its regulation avoids the absolute prohibition of speech by merely "channeling" it. (Pet. Br. 28). *Young* v. *American Mini Theaters, Inc.,* 427 U.S. 50 (1976), is cited in support of this "channeling" concept. That case, however, is inapposite. *Young* involved a Detroit zoning ordinance which regulated the location of "adult theaters." This Court upheld the ordinance, finding that it was nothing more than a zoning regulation based on the city's well established interest in maintaining the character of its neighborhoods. Further, the regulation was found not to limit the total number of such theaters or greatly restrict access to them by interested members of the public. Indeed, Justice Stevens specifically noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71 n. 35 (Stevens, J.). And, as noted by Justice Stevens, the trial court had

are also more likely to be viewed by children in the home. Thus, the material to which children are exposed on radio and television may be assumed to be subject to parental supervision to a far greater extent than much of the material to which children are likely to be exposed in other media. And, according to *Broadcasting* magazine, technology is now prepared to provide parents with a device which will permit them to "program" their home television set in advance so that it will only receive material selected by the parent, even in the parent's absence. *Broadcasting,* February 27, 1978, at 83. A copy of this article is contained at 20a in the Addendum to this brief.

found that there were "myriad locations" suitable for adult theaters available in Detroit. *Id.*

In the instant case, on the contrary, the regulation is a wide-ranging proscription the effect of which is to *suppress* protected speech. The Commission's action significantly—and purposefully—limits virtually any availability of the speech in question. Some broadcasters—for example, licensees of daytime-only stations[41]—will be absolutely prohibited from broadcasting material falling within the Commission's definition of "indecent." Unlimited-time stations which may still be able to broadcast such material will be able to do so only in late night and early morning hours, if then.[42] Moreover, such limitations will totally bar most adult audience members who have normal daily schedules from hearing over radio or television any material containing the language at issue. It is clear that this Court's holding in *Young*—based as it was on the fact that one desiring to see a particular movie would be able to do so without substantial inconvenience in the sections of the community allowed to show it—can hardly be read as authority for the vast censorship power here asserted by the Commission.

(b) Constitutional Principles Applicable to the Evaluation of Material With Respect to Minors

In addition to failing to perceive the substantial overbreadth of its action, the Commission has, in its *Order* and its brief to this Court, misinterpreted the First Amendment principles applicable to the substan-

[41] Others in this group include share-time operators and licensees who do not choose to broadcast all night long.

[42] *See* note 40, *supra*.

tive evaluation of material even with respect to minors. The Commission relies primarily on two opinions of this Court which, according to the Commission, support its position that the Commission may, consistently with the First Amendment, proscribe non-obscene speech in the interest of protecting children. (Pet. Br. 27). Those cases—*Miller* v. *California*, 413 U.S. 15 (1973) and *Ginsberg* v. *New York*, 390 U.S. 629 (1968)—do not so hold. Indeed, they tend to undercut the Commission's position. While, in both cases, the Court evidenced concern that children not be exposed to sexually explicit materials, it also evidenced concern for those substantial societal interests underlying the First Amendment guaranty of a free press. In order to reach an acceptable middle ground between these competing concerns, the Court approved a set of narrow standards permitting the limited regulation of a carefully defined class of material. *See, e.g., Ginsberg* v. *New York*, 390 U.S. at 646. In particular, the standards discussed in both *Miller* and *Ginsberg* specifically require the establishment both of the prurient nature of the work in question and the absence from the work, as a whole, of any literary, artistic, political or scientific value. *Id.* The Commission's definition of "indecent" does *not* permit consideration either of the prurient appeal *vel non* of the work (even in the case of adults) or of the overall context of the work. Additionally, the Commission's standard, although ostensibly tied to "sexual or excretory activities or organs," is not limited to "sexually explicit" material.[43] Rather, as discussed above at page 7, if a word, regardless of the

[43] The Commission recognizes that *Miller* and *Ginsberg* both relate to "sexually explicit materials." (Pet. Br. 27, 44). However, the Commission fails to note that its standard is in no way limited to such materials.

context in which it is used, has some meaning relating to sexual or excretory activities or organs, it is proscribed. The Commission's policy thus completely ignores the fact that even "minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

The holding in *Erznoznik* is squarely in point. There this Court held unconstitutional a local ordinance in effect prohibiting the exhibition of motion pictures involving the human bare buttocks, human female bare breast or human bare pubic areas if such exhibition is visible from any public street or place. The validity of the ordinance was defended in part as a means of protecting youths from viewing such films. The Court rejected this defense, saying:

> [T]he restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

422 U.S. at 213-14 (citation and footnote omitted). Thus, the Commission cannot justify its proscription of non-obscene speech simply on the basis of its determination that such speech may be inappropriate for children.

(c) The Relationship Between Parent and State

The Commission has fundamentally misconstrued and misapplied the holdings of this Court relative to the relationship between the parent and the state. The Commission is, in effect, placing itself in the role of protector of parental interests as those interests were described by this Court in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). However, the Court in *Yoder* held that the state may not interfere with an Amish parent's decision not to send his children to secondary school for religious reasons. In doing so, the Court pointed out that the parent's role, *not* the state's, is primary in shaping a child's upbringing.[*] In attempting to dictate standards of "proper" language, the Commission is imposing its determination on parents and thus preventing them from exercising their own independent judgment in this area. As a result, the Commission is unconstitutionally intruding into the

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[*] This idea was expressed even more forcefully in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), which held that a state could not require a child to attend public school:

> [The statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

very zone of parental interests which, it asserts, it is attempting to protect.

(d) Lack of Evidentiary Support

The Commission offers absolutely no evidence in support of the societal interest in protecting children which is being asserted. For example, the Commission assumes, without the least support, that the words proscribed as "indecent" are words which "most parents regard as inappropriate for [children] to hear." (App. 14, ¶ 11). Secondly, in attempting in its *Order* to characterize the greater social harm which would, in its view, flow from the broadcast of "indecent" words, the Commission stated

> [o]bnoxious, gutter language describing [sexual and excretory activities and organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent . . . .

(App. 15, ¶ 11). No factual support for this proposition has been offered.[45] This complete lack of evidentiary basis is particularly glaring in light of the fact that this Court has held that the harm which may occur from exposure to assertedly indecent language is in-

[45] As pointed out at pages 4-5, *supra*, it is ironic that, in the *Violence Report* to which the *Order* here in question was attached as an appendix, the Commission concluded that, despite the existence of what it regarded as substantial evidence supporting "the view that a steady stream of violence on television may have an adverse effect upon our society—and particularly on children," 51 FCC 2d 418, the First Amendment effectively precluded Commission action aimed at the regulation of televised violence. *Id.* at 420. Here, however, where no evidence of harm exists, the Commission feels free to exercise stifling censorship.

sufficient to render the speech unprotected. *See, e.g., Lewis* v. *New Orleans,* 415 U.S. 130 (1974) (calling a policeman a "motherfucker" is protected speech); *Cohen* v. *California,* 403 U.S. 15 (1971) (slogan "fuck the draft" on a jacket is protected speech). This is the rule even where children are present in the audience. *Rosenfeld* v. *New Jersey,* 408 U.S. 901 (1972) (conviction for saying "motherfucker" to audience, including women and children, remanded for consideration in light of *Cohen.* On remand, the conviction was reversed, and the portion of the statute making it a crime to use offensive language was struck down. *State* v. *Rosenfeld,* 62 N.J. 594, 303 A.2d 889 (1973)).[46]

In summary, the Commission's assertion that its prohibition of admittedly non-obscene speech is justified by the general societal interest in protecting children from exposure to such speech is totally erroneous. The Commission's action proscribing such speech merely serves to lower the content of all broadcast material to the level of the child, primarily because of the vagueness of the Commission's *Order.* This Court has strongly reaffirmed that regulation of speech designed to protect children must be very narrowly drawn. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). The regulation here fails that test.

[46] Although Justice Powell suggested in *Rosenfeld* v. *New Jersey,* 408 U.S. 901, 905-06 (1972) (dissenting opinion) that "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" might be proscribed under a properly framed law, he has pointed out that "[i]t may not be the content of the speech, as much as the deliberate 'verbal [or visual] assault' . . . that justifies proscription." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210-11 n. 6 (1975). *See also* note 33, *supra.*

(2) *Privacy of the Home and Protection of Unconsenting Adults*

In its *Order* the Commission advanced two additional societal interests the protection of which could, in the Commission's view, justify proscription of non-obscene speech. First, the Commission noted that radios are found in the home, "where individual rights to privacy are entitled to particular respect." (Pet. Br. 18; *see also* App. 13, ¶ 9). Second, it suggested that unconsenting adults might, on occasion, be confronted without warning with offensive language on the radio, and thus be a "captive audience" of sorts. These two interests are mentioned only in passing in the Commission's brief to this Court and there is almost no discussion of either point. Nonetheless, Pacifica will briefly consider them in order to demonstrate their inadequacies.

With respect to the general societal interest in the privacy of the home, the Commission relies primarily on *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970). According to the Commission, *Rowan* indicates that "intolerable intrusion[s] on privacy" may be proscribed. (Pet. Br. 31). The Commission then suggests that the broadcast of indecent material, which may be received on radios in the home, is such an "intolerable intrusion." This reliance on *Rowan* is misplaced.

In *Rowan,* this Court upheld a statute, 39 U.S.C. § 4009,[47] which permits householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists.

[47] This statute has since been re-numbered as 39 U.S.C. § 3008 pursuant to the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719.

Under the statute, the householder is the sole judge of what is offensive to him; no government officer is authorized to screen mail or make any determinations as to offensiveness *vel non.* The role of the government is simply to effectuate the expressed desires of the individual citizen, while permitting the mailer to communicate at will to those who do not actively choose not to receive his message.

The function and effect of the *Order* promulgated by the Commission here are very different. Here the government is not a conduit for the expression of a private citizen's desire, but takes an active censor's role. In *Rowan,* the citizen's right to choose what he will receive in his own home is held to be paramount. The Court, in fact, likened the citizen's act of choosing not to receive the mail to a radio or television viewer's act of "twist[ing] the dial to cut off an offensive or boring communication and thus bar its entering his home." 397 U.S. at 737. Under the Commission's *Order,* however, the viewer has no choice. The Commission has already twisted his dial; he has no right to choose to hear the forbidden words. Likewise, the broadcaster is not granted the right to continue to broadcast the words to a consenting audience. Where a householder has alternative means of protecting his privacy, such absolute prohibition of communication will not be permitted. *See Martin* v. *City of Struthers,* 319 U.S. 141, 146-47 (1943) (ordinance forbidding door-to-door distribution of information held unconstitutional).[48]

[48] In *Martin,* this Court noted that a regulation forbidding the ringing of doorbells on homes properly posted with signs indicating an unwillingness to be disturbed would pass constitutional muster. *Martin* v. *City of Struthers,* 319 U.S. 141, 148 (1943).

The limits of *Rowan* are clearly demonstrated in a recent opinion by a three-judge district court finding unconstitutional in most respects 39 U.S.C. § 3011, a companion provision to that section upheld by this Court in *Rowan*. *United States* v. *Treatman*, 408 F. Supp. 944 (C.D. Cal. 1976). Section 3011 provided that the government could enjoin a mailer from mailing sexually oriented material to *anyone*, regardless of whether or not they had expressed any interest in receiving it, if it was found that the mailer had mailed such material to persons who had formally advised the Postal Service that they did not wish to receive such material. The effect of such a total injunction would thus be identical to the effect of the Commission's *Order*—the government could preclude *all* persons from receiving material if one person happened to be exposed to such material against his will. The three-judge district court found such total injunctive relief unconstitutional. The court was willing to uphold the statute to the extent that it would permit injunctions against mailing such materials to individuals who had specifically indicated that they did not want to receive it. This was as far as *Rowan* went. However, extension of the injunction to people who had expressed no opinion, or to those who had affirmatively solicited such matter, was held unconstitutional.

As *Treatman* suggests, *Rowan* is far too limited to support the Commission's blanket prohibition of "indecent" words. The government may have the authority to assure individuals of their ability to limit their exposure to that which they may find offensive. In *Rowan*, this ability was provided by the device of the Postal Service list; in the instant case, it is provided by both the on-off button and the channel selector. This, however, is the limit of that authority. Once the privacy interests of unconsenting individuals have been accommodated to this extent, those interests may not be advanced as a basis for action proscribing non-obscene speech.

In its *Order* the Commission briefly discusses a "captive audience" rationale, *i.e.*, the possibility that unconsenting adult listeners may be exposed to "indecent" material without warning. This basis is referred to only in passing in the Commission's brief. With respect to this rationale, it is sufficient to note that a radio may easily be turned off or tuned to another channel. An individual who may be offended by some material, far from being a "captive," has only to flip a switch in order to avoid the offending matter.[49] Thus, this rationale cannot support the Commission's asserted authority to censor non-obscene speech.

In summary, the interests of unwilling listeners in the privacy of their homes are already adequately protected by means which do not prevent willing listeners from gaining access to material they choose to hear. As a result, the Commission may not rely on an assertion of the interests of the unwilling listeners in order to justify a proscription of non-obscene programming protected by the First Amendment.

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[49] This Court has noted that radio is distinct from other media insofar as the "captive audience" rationale is applicable because "[t]he radio can be turned off, but not so the billboard or streetcar placard." *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), *quoting Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). *See also Public Utilities Comm'n* v. *Pollack*, 343 U.S. 451, 469 (1962) (Douglas, J., dissenting): "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes."

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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Literary Works Containing Words Encompassed by the Commission's Definition of Indecent

THE BIBLE *(King James Version)*:

I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that *pertain* to him by the morning light any that pisseth against the wall."

I Samuel 25:34: ". . . surely there had not been left unto Nabal by the morning light any that pisseth against the wall.

I Kings 14:10 and II Kings 9:8: ". . . will cut off . . . him that pisseth against the wall . . . ."

II Kings 18:27 and Isaiah 36:12: ". . . hath he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"

Isaiah 32:12: "They shall lament for the teats,[1] for the pleasant fields, for the fruitful vine."

Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."

Ezekiel 23:21: "Thus tho calledst to remembrance the lewdnes of they youth in bruising they teats by the Egyptians for the paps of thy youth."

THE BIBLE *(Wyclif's Version 1382)*:

Luke 11:27: "Blessed be the teetis which thou hast sokun." [Cited in II *Compact Edition of the Oxford English Dictionary* 3248 (1971) ("OED").

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[1] The word "teat" is derived from the Old English word "tit" and "tit" is now a dialect form. *II Compact Edition of the Oxford English Dictionary* 3248 (1971).

SIR JOHN D. ASTLEY

Fifty Years of My Life (1894), Vol. II, p. 186: "I must tell you that Colonel A. Paget . . . had some jumpers . . . and amongst them a very promising young tit named Woodstock . . . ."

W. H. AUDEN

City Without Walls (1969), p. 49: "I'm so bored with the whole fucking crowd of you I could scream." [Cited in *Supplement to the Oxford English Dictionary* 1170 (1972) (*"OED Suppl."*).

SAMUEL BECKET

Malone Dies [Grove Press Edition (1958)], p. 273: "His young wife had abandoned all hope of bringing him to heel, by means of her cunt, that trump card of young wives."

p. 389: ". . . fucking awful business this . . . ."

p. 393: "Fuck off said Lemuel."

Malloy (1955), p. 69: "Fuck the son of a bitch." [Cited in OED Suppl., p. 1170].

PETER BECKFORD

Familiar Letters From Italy (1805), Vol. II, p. 186: "A bevy of young tits dressed out in a fantastic, blowzy style, drew their chairs around us . . . ."

F. J. BRITTEN

Watch and Clockmaking (1884), p. 129: "If the center is missed, a tit is formed which gives trouble." [Cited in OED, Vol. II, p. 3248].

ROBERT BURNS

"Holy Willie's Prayer" (1785), XIV: "To think how we stood, sweaten, shaken and pish'd wi' dread."

"Merry Muses of Caledonia" (c. 1800), *l.* 66: "For ilka hair upon her c--t/Was worth a royal ransom." [Cited in OED Suppl., p. 705].

l. 71: "you can fuck her where'er you please." [Cited in OED Suppl., p. 1170].

"Death and Dr. Hornbook" (1787), XIX: "Just shit in a kail-blade and send it."

LORD GEORGE GORDON BYRON

Childe Harold, IV, *l.* 88: "Mother of the mighty heart,/Which the great founder sucked from thy wild teat."

CAXTON

Fables of Aesop, X, xv: "I dyde shyte thre grete toordes. . . . The wulf . . . shote thryes by the waye for the grete fere that he had." [Cited in OED, Vol. II, p. 2791].

CHAUCER

"The Miller's Tale" (c. 1386), A text, *l.* 3806: "This Nicholas anon let flee a fart."

A text, *l.* 3798: "This Nicholas was risen to pisse."

A text, *l.* 3276: "And prively he caught her by her queynte."

"The Reeve's Tale" (c. 1386), A text, *l.* 4215: "And gang awake, and went hire out to pisse."

"The Wife of Bath's Prologue" (c. 1386), *l.* 729: "How Zantippe caste pisse upon his heed."

l. 443-4: "What eyleth you to grucche thus and grone? Is it for ye wolde have my queynte allone?"

"Madam's Song," Rel. Ant., I, *l.* 260: "Onys I fley and let a fart." [Cited in OED, Vol. I, p. 964].

JOHN DRYDEN

"The Hind and the Panther" (1687), *ll.* 1455-56: "The wanton boys wou'd piss upon your grave."

"The First Satire of Juvenal" *l.* 198: "Fit to be piss'd against and somewhat more."

"The Sixth Satire of Juvenal" *l.* 370: "Call for the pot, and like a man piss out."

"Persius" (1693), *l.* 109: "Thou writ'st not, but thou pissest poetry."

l. 218: "My harmless rhime shall 'scape the dire disgrace/Of Common-shoars, and ev'ry pissing place."

WILLIAM DUNBAR

Poems (1503), lxxv, *l.* 13: "Be his feiris he wald have fukkit." [Cited in OED Suppl., p. 1170].

HENRY FIELDING

Joseph Andrews (1742): "A long piss burnt beard." [Cited in OED, Vol. II, p. 2186].

DAVID FREEMAN

Creeps[1] (1971) (Folger Theater Manuscript), p. 7:

[1] *Creeps*, a play by and about cerebral palsy victims, was presented at the Folger Theater in Washington, D.C. as the opening production in its 1973-74 season. The Folger production was subsequently presented at Playhouse 2 in New York City. The play was reviewed in *The New York Times* by Clive Barnes (Theater Section, December 5, 1973) and by Walter Kerr (Arts and Leisure Section, December 16, 1973).

Sam: "Look Rembrandt, anything you ever tried to paint always looked like shit warmed over . . . It's chickenshit and you know it."

Tom: "You don't know the difference between a tree and a telephone pole."

Sam: "There's no difference. A dog'll piss on both of them."

Tom: "And you'll piss on anything, won't you."

Pete: "Okay, Tom, cool it!"

Tom: "Why the fuck should I cool it? This prick's attacking my art."

p. 11: ". . . let the fucker go!" ". . . tell old tight-cunt you're on the can, or something."

THOMAS GRAY

Works (1884 ed.), Vol. II, p. 59: "Now they are always in a sweat, and never speak, but they fart." [Cited in OED, Vol. I, p. 964].

GRAHAM GREEN

The Honorary Consul (1973), p. 279: "I don't want to see your fucking face ever again . . . . It was cheaper for you . . . not having to pay for your fucks."

DAVID HALBERSTAM

The Best and the Brightest (1972), p. 352: "But Johnson told his staff he wanted 'no more of this coup shit.'"

p. 423: "There were only three national concerns . . . [President Johnson] told reporters traveling with him on the plane. Everybody worries about war and peace. The men worry about heart attacks, and the women worry about cancer of the tit."

p. 436: "Of one Kennedy aide he [President Johnson] could say, 'He doesn't have enough sense to pour piss out of a boot with the instructions written on the heel.' Trying to get rid of J. Edgar Hoover and then finding it was simply too difficult, he admitted, 'Well it's probably better to have him inside the tent pissing out, than outside pissing in.' Asked by reporters why . . . he had not taken a particular speech of Vice-President Nixon's seriously, he said, 'Boys, I may not know much but I know the difference between chicken shit and chicken salad.'"

p. 532: "Hearing that one member of his Administration was becoming a dove on Vietnam, Johnson said, 'Hell, he has to squat to piss.'"

ROBERT HERRICK

"Hesperides" (c. 1648), *l.* 216: "The Farting tanner." [Cited in OED, Vol. I, p. 964].

ERNEST HEMINGWAY

Across the River and Into the Trees (1950), p. 58: "I'm a shit. . . . Now muck off."

p. 222: "We had more wire strung than there were cunts in Texas."

THOMAS HOBBES

Odyssey, VII, *l.* 88: "His Riches was a never-dying Teat."

BEN JONSON

Alchemist (1610), I, i, *l.* 2: "I fart at the."

I, iii, *l.* 28: ". . . wrapped up in greasy leather or piss'd clouts. . . ."

II, iii, *l.* 201: "With all your broths, your menstrues, and materials of piss and egg shells. . . ."

Every Man in His Humour (1598), III, iii: "A beggar, a slave that never drunk out of better than pisspot metal in his life."

JAMES JOYCE

Ulysses (1922), p. 61: "The grey sunken cunt of the world."

p. 580: "I'll wring the neck of any bugger says a word against my fucking King."

p. 587: "God fuck old Bennett."

p. 767: "His wife is fucked yes and damn well fucked too."

Portrait of the Artist as a Young Man (1916), p. 86: "That is horse piss and rotted straw, he thought."

p. 138: ". . . their swishing tails besmeared with stale shite. . . ."

p. 230: "The stout student . . . farted briefly."

JOHN KNOWLES

Indian Summer (1966), p. 19: "Anymore chickenshit. . . ." "Stick it up your ass."

WILLIAM LANGLAND

"Piers Plowman" (1362), A text, V. *l.* 190: "He pisside a potel in a *pater-noster* while."

A text, VII, *l.* 143: "A Bretoner, a braggere, a bostide hym also/And bad hym go pisse with his plouh. . . ."

D. H. LAWRENCE

Lady Chatterly's Lover (1928), Ch. XVI, p. 298: "If your sister there comes ter me for a bit o'cunt an'tenderness, she knows what she's after."

Ch. XVIII, p. 334: "I'm not just my lady's fucker, after all."

Ch. XVIII, p. 342: "A lily-livered hound with never a fuck in him."

MASSINGER

Maid of Honour (1632), IV, iv: "Tho' the devil fart fire, have at him." [Cited in OED, Vol. I, p. 964].

IRIS MURDOCH

Unofficial Rose (1962), Ch. VI, p. 56: "Not that I care a fuck."

THOMAS NASHE

The Unfortunate Traveller (1594), p. 56: "I was at Pontius Pilates house and pist against it." [Cited in OED, Vol. II, p. 2186].

JOHN O'HARA

From the Terrace (1958), p. 257: ". . . such a Goddam fuck up."

GEORGE ORWELL

Collected Essays (1968), I, p. 88: "Tell him he's a cunt from me." [Cited in OED Suppl., p. 705].

D. G. ROSSETTI

Selected Letters (1965), Vol. II, p. 743, Letter of 16 Sept. 1869: "If Byron fucked his sister he fucked her and there an end."

SIR WALTER SCOTT

Kenilworth (1883), Ch. XI, p. 120: " 'Pardon me,' replied Wayland, 'I have as good a tit as ever yeoman bestrode.' "

WILLIAM SHAKESPEARE

The Tempest, IV, i, *ll.* 199-200: "Monster, I do smell all-horse-piss; at which my nose is in great indignation."

Merry Wives of Windsor, V, v, *ll.* 12-16: ". . . for who can blame me to piss my tallow?"

Two Gentlemen of Verona, IV, iv, *ll.* 19-20: "He had not been there . . . a pissing while, but all the chamber smelt him."

Henry V, II, i, *ll.* 54-55: "Pistol's cock is up; and flashing will fire follow."

Henry VI, Part II, IV, vi, *ll.* 2-5: "I charge and command, that, of the city's cost, the pissing-conduit run nothing but claret wine this first year of our reign."

The Taming of the Shrew, II, i, *l.* 223-225:

Katharina: "What is your crest? a coxcomb?"

Petruchio: "A combless cock, so Kate will be my hen."

Katharina: "No cock of mine, you crow too like a craven."

Romeo and Juliet, II, iii, *ll.* 118-119: ". . . for the bawdy hand of the dial is now upon the prick of noon."

As You Like It, III, ii, *ll.* 112-113: "He that sweetest rose will find/must find love's prick and Rosalinde."

Titus Andronicus, II, iii, *l.* 145: "Even at thy teat thou had'st thy Tyranny."

G. TITO SHAW

He's Got a Jones[a] (1974) (Folger Theater Manuscript).

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[a] *He's Got a Jones,* a play dramatizing the Deep South in the 1930's by a black playwright, was presented at the Folger Theater

1-37: "An' this cocksucker was filthy rich. . . . I don't remember any of this cock and bullshit."

1-38: "Absofuckin'lutely!"

2-1-11: "Shit, 'taint none a my fault. . . . Shit . . ., jes mad 'cause of Gladys."

3-2: "Blowin' that shitty bref in my face! . . .— blowin' farts in a cloud of dust. . . ."

3-3: "Fuck him!"

3-5: "FUCK THE MAN! He don't tell me what I can do an' can't do."

3-10: " . . . 'cause ifen it was, how could that motha fuckah. . . ."

3-11: " . . . this *devil's ass-hole* weh live in! . . . an ifen I fines out who that chicken-shit pussy-whipped pigeon is. . . ."

JONATHAN SWIFT

"Corina" *l.* 23: "And how, when master went to piss, . . ."

"An Elegy on Mr. Partridge" *ll.* 75-76: "Whom Roguish Boys in Stormy Nights . . . / Torment by pissing out their Lights."

"An Excellent New Song" *l.* 18: "His Grace swore by God, and her Grace let a fart."

"The Problem" *l.* 20: "Tho' on a throne, wou'd fall to shite."

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in Washington, D.C. in February-March, 1975. The play was reviewed in the *Washington Post* by Richard L. Coe on February 11, 1975 (Style Section) and in the *Washington-Afro American* by Charles Farrow on February 22, 1975.

l. 36: "Spread all their Charms to catch a Fart."

l. 48: "He farted first, and then he spoke."

"The Lady's Dressing Room" *ll.* 115-118: "Repeating in his amorous fits / Oh! *Celia, Celia, Celia* shits!"

"Strephon and Chloe" *l.* 178: "Can *Chloe* heavenly *Chloe,* piss?"

"Tim and the Fables" *l.* 19: "By God says *Tim* (and let a fart). . . ."

DYLAN THOMAS

Selected Letters (1966), p. 208, Letter of August 31, 1938: "I've just had . . . a lawyer's list of the objectionable words, phrases, passages and whole chunks in my short stories. The word 'copulation' . . . pissed . . . and about 20 long passages, . . . none using obscene words, none . . . to do with fucking,— all have to go in the English edition."

JOHN UPDIKE

Couples (1968), Ch. 4, p. 294: "This fucks up our party, doesn't it?"

JOHN WILMOT, *Earl of Rochester*

"A Ramble in St. Jame's Park'" (c. 1680)

ll. 1-2: "Much wine had past with grave discourse, Of who fucks who, and who does worse."

l. 86: ". . . the savory scent of salt-swoln cunt, . . ."

"The Imperfect Enjoyment" (c. 1680), *ll.* 63-64: "Through all the town, the Common fucking post, On whom each whore relieves her tingling cunt. . . ."

"Signoir Dildo" (1703), *ll.* 33-34: "Our dainty time duchesses have got a trick, to dote on some fool for the sake of his prick."

ANGUS WILSON

Old Men at Zoo (1961), Ch. 5, *l.* 276: "We'll get you, you fucker, Barley was shouting." [Cited in OED Suppl., p. 1170].

ALFRED R. WALLACE

Island Life (1881), Ch. II, p. 20: "These are all the European tits, but there are many others. . . ."

Examples of the Use of Words Encompassed by the Commission's Definition of Indecent in Conversations Recorded on the White House Tapes.[1]

Page *Conversation of September 15, 1972*

p. 9 President: "I don't believe this crap."

Conversation of February 28, 1973

p. 29 President: "The balls of a brass monkey."

p. 37 President: "Gossip and bull shitting."

p. 45 President: "Colson's got brass balls. . . ."

Conversation of March 13, 1973

p. 55 President: "Bullshit. Bullshit."

p. 55 John Dean: "Total bullshit."

p. 56 President: "Would the FBI then turn on him, piss on him?"

p. 62 President: ". . . if we are involved in pissing on Johnson. . . ." "Bullshit."

p. 67 President: "All their face making and all that crap."

[1] Source: "Transcripts of Eight Recorded Presidential Conversations," Hearings Before the Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., May-June, 1974.

p. 70 President: ". . . the assholes . . . ."

p. 75 President: "Shit, it's not sinister." "As a matter of fact, it's just a bunch of crap."

Conversation of March 21, 1973 (A.M.)

p. 126 President: ". . . all sorts of shit'll break loose there."

Conversation of March 22, 1973

p. 150 Haldeman: "Baker was a little pissed-off."

p. 183 President: "I don't give a shit what happens."

Conversation of April 16, 1973 (A.M.)

p. 196 President: ". . . and all that crap."

p. 202 President: "Shit, I'm not going to let . . ."

Examples of the Use of Words Encompassed by the Commission's Definition of Indecent in Newspapers and Magazines

Berkeley Daily Gazette, Berkeley, California, "High Court Says it's OK to Use THAT Word," Tuesday, June 8, 1971, p. 1:

> "Addressing itself for the first time to the use of the word, the Court voted 5 to 4 to overturn the conviction of a man found wearing a jacket with the words 'Fuck the Draft' on it in the corridor of the Los Angeles courthouse."

The Journal Herald, Dayton, Ohio, "It was 'Like Any Other Monday' and Then . . . ," Wednesday, March 19, 1975, p. 1 (The editor's note introducing this article explains that the material is taken from a statement which was given to the assistant U.S. attorney by a man "who

during a quarrel, shot and killed his friend and colleague.''):

> ''And he started screaming at me. I mean his teeth were—his lips were drawn back over his teeth, and he was screaming at me. And he screamed something to the effect, 'Gibson, God damn it, you are fucking with my family. You are fucking with my future. I am not going to let you do it. I'll kill you first.' And when he was saying this the gun was coming up, and right in my face. . . . And when he said that I just grabbed the damn gun and pushed it . . . and there was a terrible roar, the damn gun went off. . . . And all I could think of was 'my god, he's going to kill me . . . hang on to that gun.' . . . The whole thing was microseconds. . . . I don't know whether I pulled my gun or not, but I was conscious of squeezing the trigger, just squeezing it again, and again, and again. . . .''

The Washington Post, Washington, D. C., ''Ford Gets Pessimistic Report,'' Sunday, April 6, 1975 at A18:

> ''The mood was bluntly, but accurately, reflected by White House photographer Kennerly who described his Vietnam trip as 'the worst thing that ever happened to me in my life. . . . It is really shitty, and you can quote me.' ''

Washington Star, Washington, D. C., ''CBS Rift Comes Out in the Open,'' July 14, 1975, at C-7:

> ''The matter might have been dropped, Rather said, if it hadn't been for the 'puff piece in Village Voice. It was gutsy Dan Schorr who stuck his neck out rather than cool it. The story was bullshit, obviously; there were no direct quotes.' ''

Esquire, July, 1970 (Sally Kempton, ''Cutting Loose''):

p. 1 ''In my adolescence I screwed a lot of guys I didn't much like. . . .''

p. 3 ''They would expend a little flattery to assure me that they regarded me as a cut above the other groupies, and then they suggested that we get down to balling.''

p. 5 ''I think I am becoming in many small ways a woman who takes no shit.''

Harpers Magazine, July, 1971 (Sara Davidson, ''The Rush for Instant Salvation''), pp. 47-48:

> ''Fred, who has been quiet for a time yells: 'I don't give a shit about this intensive! I don't give a shit about yoga. I don't give a shit about anything in my life!— . . . .'
>
> ''. . . From afar comes a feminine shriek: 'FUUUCK'. . . .
>
> ''. . . Roger who is a Zen student, shakes his head with disgust. 'All I've heard from them is bullshit.' ''

Harpers Magazine, July, 1970 (John Carry, ''Washington, Sex and Power''), p. 67:

> '' 'And if he still goes out and chases other women, then he's just a shit. . . .' ''

The Nation, April 6, 1970 (E. Goodheart, ''The Rhetoric of Violence''), p. 399:

> ''The operative words are 'pig,' 'bullshit,' 'motherfucker.' It is the language of left militant students. . . . The 'alma-mater fuckers'. . . .''

The New Republic, May 23, 1970 ("The Nixon Watch"), p. 11:

> ". . . [A] speaker yelled through the loudspeakers and over TV: FUCK RICHARD NIXON!"

New York Review, May 7, 1970 ("An Exchange on Sidney Hook"), p. 44:

> "It may well be that he believes *both* that militant negroes are justified in their militancy and that students are justified in calling their professors 'mother fuckers.' "

San Francisco Magazine, June, 1970 (Terry Link, "Black and White in Blue"), p. 16:

> "The kind of racism that has separated him from his fellow white officers is so commonplace that it's scarcely noticeable. . . . 'You drive down the street and the other guy says "Look at those fucking n-----s!" But they don't do that too much around me anymore.' "

Charles B. Seib

The Washington Post
April 16, 1975

'Dirty Words'

Every newspaper editor agonizes occasionally over whether to print dirty words. And most have found themselves in the uncomfortable position of using such ridiculous euphemisms as "barnyard epithet" (Time magazine once called it "the pastoral expletive") or "vulgar word for sexual intercourse" or playing fill-in-the-blanks with the reader, as in "b—t." Or in the more forthright but also uncomfortable position of having decided to print in its full glory a word that is bound to set off a storm of reader protest.

As society's restraints on bad language have slackened, the decisions on whether to print have become more difficult. Words once safely beyond the pale, no matter what the circumstances, must now be considered, and the sensitivities of a perhaps dwindling segment of readers must be weighed against the abstraction we call the public interest.

The rule followed on this paper and on many others is that taboo words—any child over the age of eight could assemble the list — are used only if necessary to the story. That is, they are printed if they convey to the reader an essential fact or element of mood, situation or personality that can be conveyed in no other way.

It is a sensible rule and a fairly simple one, but it isn't easy to apply. As The Post's resident gadfly, I objected recently to the use of a vulgarism (registering about 3 on an offensiveness scale of 5) in a story from Saigon. I felt it was a casual expletive, such as occurs often in conversation these days, and not necessary to convey the sense or the temper of the quotation in which it appeared. The editors who printed it had decided the other way, of course, under the same general rule.

Usually these decisions — and the protests that publication sometimes generates — are taken in stride. Troublesome as they can be, they do not rank among the major crises of the news business. But occasionally there is a forceful reminder of just how strong the remaining strands of taboo still are.

Which brings me to the case of Charles Alexander, until recently the editor of the Dayton (Ohio) Journal Herald and now at liberty.

Last month Alexander made one of those decisions. He had in hand a sensational document—the verbatim statement to authorities of a Treasury

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The writer is an associate editor of The Washington Post, serving as an internal "ombudsman." From time to time, he also writes a column of press criticism.

agent who had shot and killed a colleague during a bitter quarrel over which of them would get a transfer.

The agent's description of the climax of the quarrel, just before the shooting began, included that vulgar word for sexual intercourse.

Alexander printed the transcript across the top of page one of his newspaper, using the taboo word twice. The next day, after a confrontation with the paper's management, he offered his resignation. It was accepted. He explains that he was asked if he had approved the publication. "I said yes. They said it was indefensible. After that, resignation was the only proper thing to do."

There may have been other elements in that outcome, but the fact is that publication of a word known to every American, literate or illiterate, triggered the departure of a respected journalist from a respectable newspaper.

Before he left the *Journal Herald*, Alexander wrote and published a column in which he movingly made it clear—clearer than I could—that when editors consider taboo words, it isn't simply in terms of the cynical old newspaper question: "Well, shall we rattle their teacups?" So I will let him have the last words.

After recounting the circumstances in which the word was used, Alexander wrote:

"What the account of Carroll Gibson [the Treasury agent] tells us with a vividness that I would hope none of us or our children would forget is that killing in most cases is the final, but not the crucial act. The crux comes when the common love and respect we ought to have for each other dissolves into hate, and we turn the corner from passionate verbal combat or quarreling to mortal combat.

"Psychologists are fond of telling us how healthy it is to 'let it all hang out.' That's true only to a point. Then comes the moment of truth when we must decide whether we are men and women or animals of the jungle. Carroll Gibson's account is the story of two men who made the turn. Pure logic tells us that at some point there must be restraint or we will destroy ourselves—physically or mentally—in an irreversible act. The weapon can just as easily be an accelerator and steering wheel in the hand of an enraged driver as a gun.

"To me the telling of that message from an incident of real life, including in one instance the raw vulgarity used by a man blind with rage, is a lesson

that every man, woman and child should perceive in all its dimensions. It is shocking—it surely should be.

"The complaints we received had nothing to do with introducing a word into the culture, much less into the language. The objection was to putting it into print. I did not approve its publication lightly. I would have preferred to avoid it. As a matter of practice, it is not done at all on this newspaper unless it is deemed unavoidable. But if it seems unavoidable, I question that the basic cause of decency is served by playing euphemistic

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games. 'You don't have to print the word because everyone knows what goes in there anyway,' I was told by several callers.

"If its use in print contaminates children—and I am amazed at the number of children under 12 who, according to parents, read the paper from cover to cover—I would hope that parents would have the depth to realize that the real lesson here is not so much that the word in question is never used—children know better—but that intemperate language is often a prelude to intemperate behavior and tragedy. Language is the verbal expression of man's condition, not the source of it. Language is amoral.

"To view the story as a mere verbal account is to miss its deeper significance. In an era in which homicide is on an alarming rise, most of it resulting from arguments between members of the same family, or between friends and acquaintances, we wonder why the admonition that 'thou shalt not kill' is having so little impact. Is it because of vulgar language? Or might it be because we are so pre-occupied with the superficialities of life—the trappings—that we ponder only casually, if at all, the real meaning of the drama that goes on amid those trappings?

"Finally, those who say that one would never have seen such a word printed in full in a family newspaper five years ago are probably correct. It is not common now, although not unheard of. It is most uncommon in this newspaper. I think it will be unknown henceforth. I don't quarrel with that point of view. That is a proper editorial judgment and obviously the more inoffensive one.

"I am not a champion of dirty words. I am a champion of the press trying, as the opportunity presents itself, to give mankind a telling insight into its own frailty. Perhaps that comes from a sensitivity to my own. The essence of the news is the classic struggle of man to overcome his frailty and his search for order to aid in that struggle. I would hope we can view the implication openly."

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Do-it-yourself censor. It looks like a pocket calculator, but the Video Protor, when hooked up to a standard TV channel selector, controls which shows can be seen on the set. With the Video Proctor, claims the designer, a parent, with the help of a weekly TV schedule, punches the keyboard, entering the day of the week, time, channel number and duration for each program the parent feels is acceptable for family viewing. It remembers all entries made and when the set is switched to a channel at a time when that channel was not entered, the screen remains blank and the audio silent, blocking out all other VHF and UHF channels and cable, TV games, cassettes and pay TV. The device has a lock. The Video Proctor, which will sell for between $50 and $60, computes for one week and can recycle that computation weekly. Alterations can be made at any time by the parent, who has the key. A product of Ray Dobson Creative Services, New York, it will be test marketed by September, then on the open market within a year, according to Mr. Dobson, who is negotiating the licensing of the Video Proctor with mailorder retailers.

FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION AND UNITED STATES

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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The Federal Communications Commission in its opening brief discussed two basic issues in this case: whether the term "indecent" in 18 U.S.C. § 1464 has a separate and distinct meaning from the "obscene," and whether the FCC reasonably concluded that certain words in the Carlin recorded monologue were indecent "as broadcast." After supporting the FCC below, the Department of Justice now has filed a brief in opposition to the FCC. We will briefly high-

light the areas of agreement and disagreement between the Department of Justice and the FCC.[1]

The Department supports the Commission on the first issue, concluding that "indecent" and "obscene" in Section 1464 have separate and distinct meanings. U.S. Br., 19-23. However, on constitutional grounds the Department argues that Congress, and therefore the Commission, may only regulate the broadcast of indecent words which are used deliberately to attack, to shock, or to outrage the audience, or "in any radio broadcast *specifically directed at younger children* regardless of when broadcast." U.S. Br., 40-41.

1. The Department notes that Congress in Section 1464 used the disjunctive: "the prohibition encompasses language which is *either* obscene *or* indecent *or* profane."[2] U.S. Br., 19. Section 1464 expressly prohibits any indecent language, and "the natural reading of the provision is that it bans the

[1] "The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order." 28 U.S.C. § 2348.

[2] " 'Profane' is, of course, capable of an overbroad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Tallman* v. *United States*, 465 F.2d 282, 286 (7th Cir. 1972). This case does not involve "profane" language.

use of certain words and phrases, regardless of their context." U.S. Br., 20. Since Section 1464 prohibits any indecent language, "a single mention of the offending word was forbidden, even without emphasis or repetition." U.S. Br., 20. Almost all, "if not all, of the words selected by George Carlin meet the test" of the indecent. U.S. Br., 20. Congress in Section 1464 announced a flat ban on the broadcast of indecent language; however, the Commission may construe it "to allow a more discriminating time-limitation." U.S. Br., 21.

The Department thus agrees with the FCC that this Court's decisions do not compel the conclusion that the indecent is subsumed into the obscene. There is no vagueness problem because the Commission "has adopted a definition that tracks, as near as can be, part (b) of the *Miller* standard," *Miller* v. *California*, 413 U.S. 15 (1973). U.S. Br., 22. The Department finds nothing in the meager legislative history which casts any doubt on this construction of Section 1464, and that, absent constitutional limitations, there would be no reason to limit the plain words of the statute. Finally, the Department suggests that Congress meant to go to the constitutional limit in enacting Section 1464. U.S. Br., 23.[3]

These arguments buttress the Commission's argument on the statutory construction question. Additional support for the Commission's position is found

[3] The Department also agrees with the FCC's interpretation of the "indecent" prohibition as "an anti-nuisance law." U.S. Br., 22.

in the recent Senate debate and passage of the Criminal Code Reform Act (S. 1437). The Act includes a new Section 1842, "Disseminating Obscene Material," which would make it a crime to broadcast obscene material. It would return Section 1464 to the Communications Act where it had originated.[4]

2. Despite the fact that the Commission's holding was limited to the facts complained about, the briefs in opposition continue to treat the FCC's Order "as though it prohibited any TV or radio broadcast which included one of the seven words." (A. 93). But, as Judge Leventhal pointed out below, the following factors were critical to the Commission's holding that "the language as broadcast was indecent":

> 1. The words depicted "sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media. . . ."
>
> 2. The words were broadcast "in the early afternoon * * * when children were undoubtedly in the audience."
>
> 3. The "prerecorded" words were "repeated over and over" and "deliberately broadcast." (A. 93-94)

---

[4] During the debate, it became clear that the Senate regarded Section 1464 as prohibiting language beyond that prohibited under *Miller* v. *California*, 413 U.S. 15. See especially colloquy between Senator Kennedy, floor manager of the legislation, and Senator Griffin. 124 Cong. Rec. S534 (January 26, 1978). See Attachment to this brief.

This holding, as Judge Leventhal noted, necessarily included the limitations of time (the afternoon) and manner of presentation (deliberate repetition). (A. 93, 104).

Historically, the Commission has refused "to issue interpretative rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 602 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973); see also A. 44. In view of this reticence to render broad advisory opinions, it is especially appropriate to read this order as narrowly resolving a single complaint. If Pacifica had disputed the essential findings on which the order rested, as it now appears to do, Pacifica Br. 3-4 n. 3, 48 n. 40,[5] the Commission would have afforded Pacifica "the functional equivalent of a jury determination of a clear community consensus. . . ." *Illinois Citizen Committee* v. *FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975). The Commission also would have provided "all of the formalities for an adjudicative proceeding. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 373 n. 3 (1969). But Pacifica never sought reconsideration and never asked the FCC to invoke these procedures.

In fact, the Commission specifically limited its holding to the language as broadcast, while taking the opportunity to issue a declaratory order for the

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[5] The radio broadcast statistics which Pacifica submits do not contain data for children age 2-11. See Brief for Amici Curiae ABC, *et al.* 9 n. 7.

guidance of the public and broadcast licensees. The Commission undoubtedly intended its order to provide guidance, but its holding extended only to the comedy monologue. As Judge Leventhal observed below, given the procedural posture of the case, "the issue of what might be broadcastable in the early evening is not before us, and raises different considerations." (A. 104).

While the Commission's order reserved this and other questions for future cases (A. 15-16), it did indicate that it was not retreating from prior decisions recognizing that broadcasters have a constitutional right to present controversial and provocative programming. (A. 11).

> [The order was] not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children."

(A. 18).

The declaratory order does not make the susceptibilities of young children the norm for all broadcast programming. It is entirely possible that language which would be indecent at 2 p.m., when unsupervised young children could hear it, would not be so if broadcast at a time when parents could supervise their children. The Commission will decide that very different question when it arises.

We regret that the Department of Justice has changed its mind and no longer supports the Commission's order. The approach which it proposes (U.S. Br., 40-41) turns largely on the subjective intention of the broadcaster. It does not adequately recognize the parental and privacy interests that the FCC sought to further by its order. Nor do this Court's decisions compel such a rule for broadcasters, who must make programming decisions, as public trustees, in the interest of the communities they are licensed to serve.[6]

The FCC has not imposed a flat ban on these or any other words. It seeks to channel "indecent" language out of time periods when it would be available to young, unsupervised children. The precise time "channels" have not been firmly established, they may vary from community to community, and they must be established in the first instance by each broadcaster with the knowledge of and with the assistance of his community.[7] Judicial review can ensure that the Commission will "fully respect the licensee's range of discretion, and not disaprove the licensee's

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[6] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367; *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943); *United Church of Christ* v. *FCC*, 359 F.2d 944 (D.C. Cir. 1966). See also *Programming Policy Statement*, 44 FCC 2303 (1960).

[7] "Thus, we do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve." *Programming Policy Statement, supra*, 44 FCC at 2316.

action merely because the agency had a different view of the matter, but only because the licensee had gone so far as to be marked for an abuse of its license." (A. 103-104).

Pacifica's argument in this Court abrogates its own earlier pledge to the Commission that it was "sensitive to its responsibilities to its listening audience and *carefully schedules for late night broadcasts* those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." *Pacifica Foundation*, 36 FCC 137, 149 n. 3 (1964). (Emphasis added). The Commission's order, which merely enforced those responsibilities, rests on a sound interpretation of Section 1464 in the light of this Court's decisions in analogous areas of broadcast regulation. The order seeks to protect parental and privacy interests[8] which the Commission has the duty to vindicate under the Communications Act, to the extent that this Court's constitutional opinions permit.

* * * *

[8] *Cf.* Warren & Brandeis, *"The Right of Privacy*, 4 Harv. L. Rev. 193, 195-197 (1890).

For the reasons stated in this reply brief and in our opening brief, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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ATTACHMENT

Mr. GRIFFIN. Mr. President, as the floor manager may know, I serve on the Communications Subcommittee of the Commerce Committee and it has been brought to my attention that certain portions of S.1437 which relate to broadcasting could perhaps use some clarification.

As I understand the situation, this bill would create a new section 1842, entitled "Disseminating Obscene Material," and would transfer section 1464, entitled "Broadcasting Obscene Language," from the existing criminal code to a place in the Communications Act.

In other words, if this bill is enacted, there would then be two provisions of Federal law which could deal with obscenity on the electronic media.

Proposed section 1842 would make it a criminal offense to broadcast "obscene material," which is specifically defined; at the same time, section 1464 of title 18 which would be transferred to the Communications Act, would make it a crime to utter obscene, indecent, or profane language by means of radio communication.

Now, in the hope of lessening the possibility of confusion in the future, I would like to express my understanding of the intent of the Senate with regard to these provisions and then ask the distinguished floor manager to respond.

The broader provision, the present 18 U.S.C. 1464, which refers to "radio communication" and "obscene, indecent, or profane language" remains applicable to broadcasting as well as other means of radio communication such a citi-

zens band radio. However, it should be clear that reference to broadcasting in section 1842 is not intended to make only this section applicable to broadcasting. In other words, it would therefore be possible that some broadcast material, though perhaps not obscene under the standards set forth by the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973) or within the meaning of section 1842 could still violate the indecency prohibition of section 1464. In fact the Supreme Court recently granted certiorari in *Pacifica Foundation* v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), a case where the Federal Communications Commission found some language indecent (though not obscene) within the meaning of section 1464. Of course, the Court may decide whether nonobscene (indecent) matter can be prohibited in the broadcasting medium, because of that medium's unique qualities, though the same material might be accorded first amendment protection in books, movies, or newspapers.

Thus, it is my view that this broader coverage is applicable to the broadcasting medium.

I want to be sure it is the sense of the Senate that this broader coverage is applicable and would remain applicable.

Mr. KENNEDY. Mr. President. It is our intention that section 1464 is only to be transferred into the Communications Act. In fact, footnote 100 on page 855 of the report specifically states that the broader coverage mentioned by the Senator has been preserved by transferring section 1464 to the Communications Act.

Mr. GRIFFIN. I thank the distinguished floor manager.

Mr. KENNEDY. I think that clarifies it, and I welcome the opportunity to do so.

124 Cong. Rec. S 534 (January 26, 1978).

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OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION AND UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 45–107) is reported at 556 F. 2d 9. The opinions of the Federal Communications Commission (A. 6–40, 41–44) are reported at 56 F.C.C. 2d 94, and 59 F.C.C. 2d 892.

JURISDICTION

The judgment of the court of appeals (A. 115–116) was entered on March 16, 1977, and a petition for rehearing with suggestion for rehearing *en banc* was denied on May 10, 1977 (A. 117–119). On August 5, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including

October 7, 1977. The petition was filed on that date and was granted on January 9, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, consistent with statutory and constitutional limitations, the Federal Communications Commission may proscribe, at least during most hours, the radio broadcast of specified "indecent" words.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment of the United States Constitution, in pertinent part, provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. Section 1464 of the Criminal Code (18 U.S.C. 1464) provides:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

3. Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended (47 U.S.C. 326), provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

4. Section 303(g) of the Communications Act of 1934, 48 Stat. 1082, as amended (47 U.S.C. 303(g)), in relevant part, provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (g) * * * generally encourage the larger and more effective use of radio in the public interest.

STATEMENT

1. In the early afternoon of October 30, 1973, about 2:00 p.m., respondent's radio station WBAI-FM, in New York City, broadcast a recording of a monologue by comedian George Carlin entitled "Filthy Words." The monologue consisted of a twelve minute discussion of "the words you couldn't say on the public * * * airwaves * * * the ones you definitely wouldn't say, ever * * *" (A. 8, 19), and was included in a regularly scheduled program, "Lunchpail," devoted that afternoon to "a general discussion of the use of language in our society" (A. 3, 9). Immediately before the recording was played, the host of the program warned that it included sensitive language that might offend some listeners, advising them to change the station and to return to WBAI in fifteen minutes (A. 3–4, 9–10).

On December 3, 1973, the Federal Communications Commission received a complaint about the broadcast from a man in New York City who said he had heard the Carlin monologue over WBAI-FM while he was

driving in his car with his young son (A. 2–3, 8). The Commission forwarded the complaint to WBAI–FM with a request for comments (A. 9). In its response, the station defended its broadcast of the Carlin monologue on the "Lunchpail" program "as an incisive satirical view of the subject under discussion" (A. 3–4, 9–10).

2. On February 21, 1975, the Commission issued a Declaratory Order and supporting Memorandum Opinion (A. 6–19) addressing the complaint against WBAI–FM. It determined that the language used in the Carlin monologue was "indecent" and that the station's deliberate broadcast of the monologue therefore violated the prohibition contained in 18 U.S.C. 1464 against the utterance of "any obscene, *indecent* or profane language by means of radio communications * * *" [emphasis added]. Although authorized to impose various administrative and penal sanctions against licensees who violate Section 1464,[1] the Commission declined to order such sanctions against Pacifica in this instance,[2] choosing instead "to clarify the standards which the Commission utilizes to judge

[1] The Commission is empowered to revoke a station's license (47 U.S.C. (and Supp. V) 312(a)), to issue a cease and desist order (47 U.S.C. 312(b)), and to impose a monetary forfeiture (47 U.S.C. 503(b)(1)(E)) for a violation of 18 U.S.C. 1464.

[2] The Commission warned that "this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress" (A. 17).

'indecent language'" for the guidance of licensees in the future (A. 17).[3]

The Commission identified four factors which informed its decision to control the broadcast of offensive language (A. 13): "(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."[4] With these considerations in mind, the Commission concluded that certain words used in the Carlin monologue, all of which were "repeated over and over" and

[3] The Commission also noted that its Declaratory Order would permit not only Pacifica, but other parties affected by the Commission's action as well, to present their views before the Commission and to seek judicial review (A. 17).

[4] Five years earlier, in *WUHY–FM, Eastern Educational Radio*, 24 F.C.C. 2d 408, the Commission for the first time relied upon Section 1464's prohibition against the broadcast of indecent language. In that case, the Commission considered a broadcast in which expletives were repeatedly used. Noting that this language did not appeal to listeners' prurient interest and therefore could not be considered obscene as that term had been defined in prior case law, the Commission found that the broadcast was nonetheless "indecent," in violation of Section 1464, and fined the offending station $100 under 47 U.S.C. 503(b)(1)(E). Although the Commission stated that it would welcome judicial review of its action, the station declined to seek review.

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were "deliberately broadcast," were "indecent" and therefore within the prohibition of Section 1464 when aired by WBAI in the early afternoon "when children were undoubtedly in the audience" (A. 16–17).

Finally, the Commission invoked Section 303(g) of the Communications Act as additional authority for the Order (A. 18). Adverting to its "statutory obligation to promote the larger and more effective use of radio in the public interest," the Commission concluded that it would be "abdicat[ing its] responsibility to the public interest" if it took no step to prevent the "widespread use of indecent language on the public's airwaves" (*ibid.*).

Commissioner Robinson, joined by Commissioner Hooks, issued a concurring statement (A. 26–40) in which he emphasized that the Commission wished only to "regulate offensive speech to the extent it constitutes a public nuisance" and that he would probably consider the Carlin monologue unobjectionable "if it were broadcast at an appropriate hour and accompanied by suitable warning" (A. 35, 36 n. 9). Commissioners Reid and Quello, in separate concurring statements (A. 24–26), indicated that language such as that contained in the Carlin monologue could not in their view be lawfully broadcast at any time.

3. By a petition for clarification or reconsideration of the Order, the Radio Television News Directors Association sought a ruling from the Commission regarding the applicability of the Order to the broadcast of the listed sexual and excretory words in the context of "audio and video 'actualities' of angry

political demonstrations and even more structured political debate, interviews and conversations * * *" (A. 42). The Commission declined to address specifically the hypothetical problems raised in the petition, commenting only that it would be "inequitable" to sanction a licensee for the broadcast of material over which the licensee had no journalistic or editorial control (A. 43–44, and n. 1).

4. The court of appeals reversed the Commission's Order. Judge Tamm, in an opinion announcing the judgment of the court (A. 45–64), found that the Order violated Section 326 of the Communications Act of 1934, which prohibits the Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station * * *" (A. 52–59). In the alternative, Judge Tamm concluded that the Order was both unconstitutionally overbroad, because it "sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be" (A. 59–61), and vague "in that it fails to define children" (A. 61), the class whose presence in the audience the Commission deemed sufficient to transform otherwise protected uses of sexual or excretory words into prohibited "indecent" language.

Chief Judge Bazelon concurred in a separate opinion (A. 64–91). Suggesting that this Court's most recent definition of "obscenity" announced in *Miller* v. *California,* 413 U.S. 15, is the exclusive test for regulating offensive language (A. 71–77, 78–79, n. 22),

Judge Bazelon found that the Commission's definition of "indecent" as contained in Section 1464 was "massively overbroad" under *Miller* (A. 69, 74), because "the Commission does not test the 'indecency' of speech under 'local community standards,'" "appeal to the prurient interest is not to be considered," and "a work is not [to be] judged as a whole" (A. 74–75). Noting that the ban on the broadcast of sexual or excretory words when children may be in the audience would effectively censor the material available to "[a]dults with normal sleeping habits" (A. 85), Judge Bazelon concluded that no sufficiently compelling reason had been shown to justify that result (A. 80–91).

Judge Leventhal dissented (A. 91–100). He believed that the Commision's Order should be read narrowly—"limited to the language 'as broadcast' in the early afternoon" (A. 93–96, 104)—and, that "the issue of what might be broadcastable * * * [at other times] is not before us" (A. 104). He found that the Commission's "opinion on what is 'indecent' stands as a functional equivalent to the Supreme Court's current 'obscenity' ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation" (A. 97). He concluded that the Commission's prohibition against the broadcast of such material in the early afternoon constituted a reasonable "regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience" (A. 101), and which was necessary

to protect children who are at home unsupervised during the day (A. 99–100, 104–105).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The United States is a statutory party in this agency review proceeding. 47 U.S.C. 402(a); 28 U.S.C. 2344. Although the Department of Justice joined the Federal Communications Commission in defending its Order before the court of appeals—mistakenly, as we now believe—we did not support the petition for certiorari. The United States is accordingly a respondent here. Rule 21(4) of the Rules of the Court.[5]

But our participation at this stage is not merely as a formal party. The Commission's Order is founded on 18 U.S.C. 1464, a provision of the Criminal Code which the Department of Justice has an independent duty to enforce. As with respect to the anti-lottery provision in 18 U.S.C. 1304, "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296. Thus, a ruling by this Court will immediately affect the Department. What is more, in reaching its decision, the Court is entitled to know our position. See *id.* at 294–295.

These considerations sufficiently explain our separately submitting the views of the United States. Regrettably, after reconsideration, we cannot support

[5] We have amended the caption of the case accordingly.

the Commission's Order. We state our reasons in the pages that follow.

1. We begin (*infra,* pp. 12–17) by analyzing the Commission's Order in some detail to determine its precise scope. Our assessment is that it must be viewed as banning absolutely, for all but the very late evening hours, the radio broadcast of certain defined "indecent" words, regardless of their context. As for the late evening, we note that the Commission has merely "intimated" that it may permit such words to be aired, and then only on condition that their inclusion in broadcast material is not without "serious literary, artistic, political or scientific value" (A. 43).

2. We turn next to the statutory framework of the Order (*infra,* pp. 17–24). We join the Commission in its construction of the anti-censorship provision of the Communications Act (47 U.S.C. 326) as not disabling the agency (or the Department of Justice) from implementing the prohibitions of Section 1464. But we indicate our view that Section 326 forecloses any reliance on the "public interest" standard embodied in Section 303(g) of the same Act, as independent authority for any broadcast ban of "indecent" language.

We then address Section 1464. Our conclusion is that the statute, on its face, authorizes a proscription of "indecent" language that is not obscene, regardless of context, and therefore supports the Commission's Order. We consider and reject the argument that this Court has foreclosed such a reading of Section 1464

by narrowing the scope of other similarly worded, but differently effective, federal statutes. Yet, of course, we accept that constitutional limitations may confine the apparently wide scope of the statute.

3. When we come to consider the effect of the First Amendment (*infra,* pp. 24–28), our first conclusion is that the "indecency" provision of Section 1464, as construed by the Commission, cannot qualify as a permissible anti-obscenity statute. Accordingly, we explore the indications in this Court's decisions that appear to govern "nuisance" or "zoning" laws that prohibit or channel non-obscene speech. Putting aside "fighting words" as irrelevant to this case, we suggest that nuisance or zoning laws that affect protected expression must be tested according to three criteria: (a) the degree of offensiveness of the matter sought to be proscribed, (b) the extent to which unwilling viewers or listeners are in a "captive" audience, and (c) whether the prohibition or restriction will have a significant deterrent effect on uninhibited speech.

4. Finally (*infra,* pp. 28–41), we seek to apply these criteria to the Commission's Order. First, we test the ruling as though it banned the radio broadcast of the defined "indecent" words for all hours. We note the flaw in any suggestion that a radio ban has only limited impact. And we then examine the arguments which are said to make the radio situation unique.

We reject the notion that the inherent limits of the radio medium justify a ban that is not related to diversification. Focussing on the claim that radio is par-

ticularly "intrusive," we suggest the answer lies in the ease with which the offending program can be turned off and the alternative of banning the *instrument* from certain locales, rather than censoring at source. And we address the Commission's concern for the young audience, concluding that the inevitable presence of young listeners in the audience cannot justify condemning adults to hearing only "what is fit for children."

We then consider the suggested lifting of the ban on the broadcast of "indecent" language in the late evening. We note that, even then, the exemption would be too grudging. But, more fundamentally, we submit that, because, at all times, the radio audience will include both children and adults, any exemption for a limited time period will both censor adults and fail to protect children. Tentatively, we suggest that proscribing the use of "indecent" words in broadcasts *specifically aimed at children,* regardless when aired, might avoid the objections we have entered.

Our conclusion is that the Commission's Order misapplies the statute, construed in light of constitutional limitations.

II. THE BREADTH OF THE COMMISSION'S ORDER

There has been some disagreement about the breadth of the Commission's Order. Judge Leventhal, dissenting in the court of appeals, apparently viewed the agency's decision as reaching only the incident in suit, focussing on the ultimate ruling that "the language *as broadcast* was indecent and prohibited by 18

U.S.C. 1464" (A. 17, 93–94, 104; emphasis added). In its brief before this Court, the Commission endorses that view (pp. 20–21, 41–45). Judge Tamm (A. 47–48) and Chief Judge Bazelon (A. 66 n. 2), on the other hand, read the order more broadly. But, characterizations aside, the scope of the agency's ruling is reasonably clear.

1. The Carlin monologue contained seven words which the Commission expressly identified as "indecent" (A. 16–17). The *words themselves*—not the inflexion or emphasis of the speaker, their gratuitous inclusion, the context, or any other surrounding facts—were flatly declared to "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and * * * accordingly [to be] 'indecent' when broadcast on radio or television" (*ibid.*). And that definition holds good 24 hours a day (A. 16).

Except perhaps for the "late evening hours" (see below, pp. 15–16), such "indecent" words are banned absolutely, regardless of context. That is made very clear. The Commission expressly says that, while the basic ban operates, "such words * * * have no place on radio," and that "indecent language * * * cannot be redeemed by a claim that it has literary, artistic, political or scientific value" (A. 15). In a final passage, the Commission itself labels the effect of its ruling as "[p]rohibiting the broadcast of 'filthy words' considered indecent particularly when children are in the audience," pointing out that "the number of words which fall within the definition of indecent

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is clearly limited" (A. 18). Finally, while the second opinion issued on the Petition for Clarification notes that the Commission is ruling "in a specific factual context" (A. 43), nothing is taken back except for live coverage of public events where "there is no opportunity for journalistic editing" (A. 43 n. 1).

In sum, it seems to us impossible to read the Commission's order in any way except as an absolute ban, for most broadcasting hours, on the utterance of any of the specified words, regardless of context. Indeed, that is what the Commission intimated in its 1960 *Programming Policy Statement*, reproduced here in its Brief (p. 32), when suggesting that the "four-letter words" in *Lady Chatterley's Lover* would violate Section 1464 of the Criminal Code.

To be sure, the Commission did point out that, in the Carlin monologue, the offending words were "repeated over and over" (A. 17). But this is perhaps no more than an aspect of the conclusion—fully justified—that the language, which was pre-recorded, was not an inadvertent "slip of the tongue," but "was *deliberately* broadcast," so as to bring into play a provision of *criminal* law (*ibid.*; emphasis added). It would be wholly unjustifiable to read that casual remark as qualifying the plain statement that the identified words have "no place" on radio while children are potential listeners.

2. Because we cannot construe the Commission's order as in any way turning upon the context in which the offending words were used, we do not discuss the question how far their use may have been "redeemed"

by the purpose for which they were included in Carlin's monologue. But it is right to note one or two points. First, from all that appears (see A. 3–4), the "Lunchpail" program, during which the monologue was played, was in no sense a "children's program" or one directed at juveniles. Second, the utterance of the "indecent" words was not gratuitous, but was essential to the subject discussed. Nor were the offending words, in their context, remotely directed *at* anyone, with or without hostility. And, finally, the language objected to was not appealing to prurient interest. Indeed, the Commission's order expressly defines "indecent language" as "lack[ing] the element of appeal to the prurient interest" (A. 15).

3. If the Commission's ban on the broadcast of "indecent" words is absolute while it lasts, there is at least an "intimation" (A. 43) that the "late evening" is exempted. If we put all the indications together, "when the number of children in the audience [is] reduced to a minimum" (A. 43) appears to mean "the late evening hours" (A. 15), in turn defined as beginning at 10 p.m. (A. 11). Even after that time, the Commission has not firmly committed itself to lifting the ban, first saying that an exemption for the late evening is "conceivable" (A. 15) and later characterizing that hint as an "intimation" (A. 43). In these circumstances, it is tolerably clear that the prohibition on the broadcast of "indecent" words is not restricted to the "early afternoon" when the Carlin monologue was in fact aired (see A. 17).

If there is an exemption for the period after 10 p.m., that lifting of the ban is strictly conditioned. "Sufficient warnings" would have to be given and, more important, the broadcast of "indecent" words would be permitted only "if in the context used the language had serious literary, artistic, political or scientific value" (A. 43–44; see also A. 15–16).

4. Although, in one place at least, the order encompasses both radio and television (A. 17), there are sufficient references to the peculiarities of the radio medium, not all shared by television (*e.g.*, A. 13), to justify the conclusion that the Commission is announcing a rule governing radio alone. On the other hand, all disclaimers aside (*e.g.*, A. 44), it is evident that the Commission has, through the present declaratory order, made an important policy statement which it intends to apply across the board to radio broadcasting. To be sure, this was an "adjudicatory," rather than a "rule making," proceeding (see 5 U.S.C. 553, 554). But, as the order itself recites, the decision was intended "to clarify the standards which the Commission utilizes to judge 'indecent language'" (A. 17) and to "set forth its position" with a view to preventing the "widespread use of indecent language on the public's airwaves" (A. 18).

5. Finally, the Commission candidly disclaimed any pretense that the words identified, or the Carlin monologue as a whole, qualified as "obscene" speech, so as to be, on that ground, outside the protection of the First Amendment. On the contrary, the order characterizes the offending words as "indecent"—a category

separately prohibited by Section 1464—explicitly distinguishing such language from the obscene in that (as we have seen) "indecency" lacks appeal to prurient interest and cannot be redeemed by its context (A. 15).

Accordingly (and correctly in our view), the Commission did not invoke the rule of *Miller* v. *California,* 413 U.S. 15 (A. 7, 14), but, instead, sought constitutional authority for its result in the "public nuisance" doctrine, asserting that it was merely "channelling" offensive language away from "an inappropriate place" (A. 17, 42). The Commission appears to adhere to that analysis in its brief before this Court (see pp. 2, 28–32, 46–48). We believe that is a correct formulation of the issue.

III. THE STATUTORY FRAMEWORK

There are three statutory provisions of arguable relevance in this case: Section 326 of the Communications Act (47 U.S.C. 326), Section 303(g) [6] of the same Act (47 U.S.C. 303(g)), and Section 1464 of the Criminal Code (18 U.S.C. 1464).[7] We consider each of these sections in turn.

1. Section 326 of the Communications Act withholds from the Commission any "power of censorship" with respect to radio broadcasts and enjoins it

[6] The "public interest" criterion is also included in 47 U.S.C. 307(a), 307(d), and 309(a).

[7] We omit provisions which merely authorize the Commission to implement Section 1464 through non-criminal sanctions: 47 U.S.C. (and Supp. V) 312(a), 312(b), 503(b)(1)(E). See FCC Brief, pp. 2–4.

from "interfer[ing] with the right of free speech by means of radio communication." Circuit Judge Tamm deemed this prohibition dispositive against the validity of the order. A. 54–58, 64. For our part, however, we agree with Chief Judge Bazelon (A. 68–69) and the Commission (Brief, p. 5, 8) that Section 326 does not resolve the case.

As the Commission has noted, in the original Radio Act of 1927 (Section 29, 44 Stat. 1172–1173), as in the Communications Act of 1934 (Section 326, 48 Stat. 1091), the identical words now found in Section 326 were followed, in the same section, by the prohibition on the utterance of "obscene, indecent, or profane language" now codified in Title 18 as Section 1464. It must follow, it seems to us, that the two provisions should be accommodated.

It may be that the prohibition of "censorship" in Section 326 means only prior restraint and does not immunize the broadcaster from subsequent sanctions. But cf. *Farmers Union* v. *WDAY,* 360 U.S. 525. At all events, we must read the "right of free speech" as not embracing "obscene, indecent, or profane language," except only as the First Amendment may intervene. Any other construction would accord little respect to the Congress that placed the two provisions in adjoining sentences.

2. This is not to read Section 326 out of the Communications Act, of course. In all other contexts, it severely restrains the Commission. And, even with respect to the ban of "indecent" words, Section 326,

we believe, forecloses reliance on any authorization other than Section 1464.

Thus, we submit the Commission cannot justify its order as implementing its "statutory obligation to promote the larger and more effective use of radio in the public interest" under Section 303(g) of the Communications Act (A. 18; see also FCC Brief, pp. 39–40). Indirect curtailment of one kind of speech in order to give access to diversified views may be permitted. But, in light of Section 326, the Commission is barred from invoking the "public interest" to wholly ban from the airways, at least for most hours, one species of language on grounds that have nothing to do with "balance" or diversity.

3. In our view, Section 1464 of the Criminal Code is the statute that governs this case. It forbids broadcasting "any obscene, indecent, or profane language." Constitutional inhibitions aside, there is no difficulty in understanding this provision. On its face, it would seem plainly to support the Commission's decision.

a. First, the use of the disjunctive indicates that the prohibition encompasses language which is *either* obscene *or* indecent *or* profane. To the suggestion that the three epithets mean the same thing, the short answer is that we must, if possible, avoid the conclusion that Congress was indulging in senseless redundancy. Cf. *United States* v. *Limehouse,* 285 U.S. 424, 427. Accordingly, it would seem perfectly reasonable to construe "indecent" as including words and phrases referring to sexual or excretory organs or

functions which, as used, do not appeal to prurient interest and therefore are not embraced within the category of "obscene language."

b. Next, since the statute expressly focuses on "language," not thoughts, messages or descriptions, the natural reading of the provision is that it bans the use of certain words and phrases, regardless of their context. This is not to be wondered at if one remembers that when the statute was written (1927) even the largest dictionaries avoided spelling out in full the most provocative "filthy" words. At that day, it might well have been answered to those who pointed to "dirty words" in the Bible, or Shakespeare, or elsewhere in literature or science or law, that the objectionable passages must not be read on the air, or must be Bowdlerized. It would follow that, under the statute, the Commission was entitled to ban use of certain words absolutely, without considering whether they were "redeemed" by the artistic or other values of the broadcast in which they were included.

c. It would seem equally clear, from the statutory prohibition on uttering "any" indecent language, that a single mention of the offending word was forbidden, even without emphasis or repetition. And so, the Commission's flat ban of any use of words and phrases defined as "indecent" would be justified.

d. No doubt, the category of "indecent" words and phrases is not self-defining. But, if we assume, as we must, that the class is not entirely empty, we must accept that most, if not all, of the words selected by George Carlin meet the test. Quibbles about one word

aside,[8] the Commission cannot be faulted for mislabelling.

e. While Section 1464 announces a flat ban, it may, perhaps, be construed to allow a more discriminating time-limitation. As we have noted, the Commission has not finally committed itself on this point. But if the First Amendment requires a partial exemption, we do not suppose the plain congressional intention to impose a ban so far as constitutionally permissible ought be defeated. At all events, it is the ban, not the exemption, that is challenged here.

f. It is suggested, however, that this Court has, in effect, construed Section 1464 as authorizing a ban on "obscenity" only, as defined in *Miller*. One court of appeals has so concluded, *United States* v. *Simpson*, 561 F. 2d 53 (C.A. 7). Of course, if that is right, it is the end of the case since the Commission acknowledges that the Carlin monologue was not obscene within that definition. But we do not so read this Court's decisions.

The Court, it is true, has indicated that other federal statutes, Section 1461 and 1462 of the Criminal Code, proscribing not only the "obscene" but also materials that are "lewd," "lascivious," "indecent," "filthy," "vile," or "immoral," should be read as reaching only obscenity. *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 130 n. 7; *Hamling* v. *United States*, 418 U.S. 87, 114; *Marks* v. *United States*, 430 U.S. 188, 190; *Smith* v. *United States*, 431 U.S. 291, 299–300. See also *Manual Enterprises, Inc.* v. *Day*, 370

[8] See Judge Leventhal's question about the word "tit" (A. 106 n. 16).

U.S. 478, 482–484 (opinion of Harlan, J.). Do those rulings control here?

Plainly, insofar as Section 1464 is merely an anti-obscenity statute, its constitutional reach can be no greater. See *infra,* pp. 24–26. But, as we have seen, the statute purports to be an anti-nuisance law as well. That claim could not reasonably be made for Sections 1461 and 1462 of the Criminal Code which prohibit the importation or transportation of offensive materials usually packaged in plain wrappers. Here, on the contrary—as perhaps also with Section 1463 dealing with wrappers and envelopes—the communication is "unwrapped" and nuisance concerns may be relevant. See Commissioner Robinson, concurring, at A. 32–33.

Nor is there a serious vagueness problem here—the concern that first led the Court to suggest a narrow redefinition of Section 1462 (*12 200-ft. Reels of Film, supra,* 413 U.S. at 130 n. 7). While, presumably, the Commission is not restricting its ban to the seven words which George Carlin thought *verboten* on the airways, it has pointed out that "the number of [such] words • • • is clearly limited" (A. 18) and has adopted a definition that tracks, as near as can be, part (b) of the *Miller* standard (A. 15, 16, 16–17). Indeed, so far as we are aware, the specificity of the ban is not challenged.

It may well be—as we ourselves suggest in a moment (*infra,* pp. 29–39)—that the Commission's order reaches beyond constitutional limits. But we cannot suppose that this Court's indications about other federal statutes were intended to foreclose, as a

matter of statutory construction, a reading of Section 1464 that would give it force beyond the strict boundaries of obscenity. If the First Amendment does not prevent it, we believe the Commission still remains free to apply the statute as a nuisance law.

g. Nothing in the meager legislative history casts any doubt on this construction of Section 1464.[9] Accordingly, were it not for constitutional considerations, there would be no justification for cutting down the plain words of the provision. But, of course, there *are* constitutional inhibitions that must be taken into account, and it is our duty to save the provision, if possible, from unconstitutionality. On the other hand, in rescuing the statute, we ought not narrow it more than constitutional mandates require. It may safely be assumed that Congress meant to go to the constitutional limit.

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[9] As we have already noted, Section 1464 was first enacted as part of Section 29 of the Radio Act of 1927, 44 Stat. 1172–1173, which later became Section 326 of the Communications Act of 1934, 48 Stat., 1091. Neither the committee reports nor the floor debates relevant to these measures contain any discussion of its intended scope. See S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926); S. Doc. No. 200, 69th Cong., 2d Sess. 19 (1927); H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934). In 1947, as a part of a revision of the Criminal Code, Section 1464 took its present form when the prohibition against the broadcast of offensive language contained in Section 326 of the Communications Act, together with its corresponding penalty provision in Section 501 of the Act, were incorporated into a new section and placed in Chapter 71 of Title 18 along with the other federal criminal statutes regulating offensive materials. The legislative history of this recodification makes no reference to the intended scope of Section 1464. See H.R. Rep. No. 304, 80th Cong., 1st Sess. A106 (1947).

With that caution in mind, we turn to consider how far Section 1464 can be squared with the Constitution, while preserving as much as possible of the apparent congressional intent.

IV. CONSTITUTIONAL LIMITATIONS

1. This is not an obscenity case. The Commission, as we have noticed (*supra,* pp. 16–17), does not suggest that the Carlin monologue was "obscene." Nor could it do so, since the material was not judged "as a whole," was not found to "appeal to prurient interest," and the condemned words, it was ruled, could in no event (at least until 10 p.m.) be redeemed in their context by "serious literary, artistic, political, or scientific value." *Miller* v. *California, supra,* 413 U.S. at 24.

Nevertheless, there recurs in some of the papers before the Court the notion that, somehow, the obscenity standard may be different in the case of radio broadcasts with children as part of the audience. In our view, any such argument is now foreclosed. Very briefly, we state our reasons.

Quite deliberately, it seems to us, the Court has announced a single standard. It applies to both the state and federal governments. *United States* v. *12 200-ft. Reels of Film, supra,* 413 U.S. at 130; *United States* v. *Orito,* 413 U.S. 139, 145; *Hamling* v. *United States, supra,* 418 U.S. at 105–106; *Marks* v. *United States, supra,* 430 U.S. at 190; *Smith* v. *United States, supra,* 431 U.S. at 299–300. It applies whether the "consumer" is an unwilling recipient, *Miller, supra,* 413 U.S. at 18; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, or a willing adult, *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49; *12 200-ft. Reels of Film, supra.* And, most important, the Court has said that the same standard governs every medium of expression. *Kaplan* v. *California,* 413 U.S. 115, 118–119.

This is not to deny that "[e]ach method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502–503. Of course, that is so: "live" performances, motion pictures, still photographs, drawings, spoken words, and the unillustrated book, although depicting or describing the same sexual conduct, will have varying impact, so that what is deemed "patently offensive" or "pruriently appealing" in one form may not be in another. But "the basic principles * * * do not vary" [*ibid*]. The obscenity standard remains the same.

Nor is there any basis for supposing that a different standard governs when children are part of a mixed audience. In fixing the standard, the Court took into account the inevitable exposure of children to most forms of pornography. See *Miller, supra,* 413 U.S. at 28; *Kaplan, supra,* 413 U.S. at 120; *Orito, supra,* 413 U.S. at 143. It is not settled how much of the "variable obscenity" doctrine of *Ginsberg* v. *New York,* 390 U.S. 629, survives today. See *Erznoznik, supra,* 422 U.S. at 214 n. 11. But that rule only permitted a finer sieve to be used when *children alone* were affected. It has always been clear that, when the two audiences could not be separated, adults could not be censored for the sake of the children. *Butler* v. *Michigan,* 352 U.S. 380; *Miller, supra,* 413 U.S. at 36;

Erznoznik, supra, 422 U.S. at 212–214. Significantly, in striking down the conviction in *Jenkins* v. *Georgia,* 418 U.S. 153, the Court did not deem it necessary to notice whether juveniles had been admitted to view the film.

2. But even if there were a "variable obscenity" standard dependent upon the medium and the likely presence of children, it is plain the Commission's order in this case would not satisfy it. For such a diluted test would still require asking two questions the order expressly holds irrelevant: "Does the material, taken as a whole, appeal to the prurient interest of children when broadcast on radio?", and "Do the offending words, in their context, lack serious literary, artistic, political, or scientific value for children when broadcast on radio?" See *Ginsberg, supra,* 390 U.S. at 645–647.

We have said more than enough about obscenity. We turn now to the Commission's "nuisance" and "channelling" or "zoning" submissions.

3. It is no longer debatable that speech, although not obscene, can be prohibited in some situations. And it is idle to pretend that content is never noticed. We may put to one side, as wholly irrelevant here, so-called "fighting words." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572. More closely in point are cases in which the prohibition depends on time or place. A sufficient example is the classical illustration of "falsely shouting 'fire' in a theatre." *Schenck* v. *United States,* 249 U.S. 47, 52 (per Holmes, J.). Another obvious instance is abusive language addressed

to a court, punishable as contempt. Further examples are the ban on political advertisements aimed at the "captive audience" of streetcars, sustained in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, and the zoning ordinance prohibiting "adult films" in certain residential districts upheld in *Young* v. *American Mini Theatres,* 427 U.S. 50. The question is whether the present order is within the principle of such cases.

At first blush, the answer would seem to be given by *Cohen* v. *California,* 403 U.S. 15, and its progeny. *Gooding* v. *Wilson,* 405 U.S. 518; *Rosenfeld* v. *New Jersey,* 408 U.S. 901; *Brown* v. *Oklahoma,* 408 U.S. 914; *Cason* v. *City of Columbus,* 409 U.S. 1053; *Papish* v. *University of Missouri Curators,* 410 U.S. 667; *Plummer* v. *City of Columbus,* 414 U.S. 2; *Hess* v. *Indiana,* 414 U.S. 105; *Lewis* v. *New Orleans,* 408 U.S. 913, reversed and remanded, 415 U.S. 130. See, also, *Spence* v. *Washington,* 418 U.S. 405; *Erznoznik* v. *City of Jacksonville, supra.* Indeed, in *Cohen,* the Court ruled that the First Amendment barred the prosecution of a young man in a public building whose jacket was emblazoned "Fuck the Draft," and in the subsequent cases convictions for publishing or uttering like offensive words on the street or in other public places were vacated or reversed.

It would be rash, however, to make too much of those decisions. What can perhaps be safely deduced from these cases is that the First Amendment prevents any attempt to *wholly outlaw* from the public language, on the ground that some will be offended, the vocabulary described in George Carlin's "Filthy

Words." But this does not resolve the question whether such words, even innocently spoken, can be proscribed for certain times and places. We assume *some* regulation is constitutionally permissible.

If that is so, applying the indications given in *Cohen, Lehman, Erznoznik* and *Young,* the relevant questions appear to be:

(a) How offensive, to how many, is the expression sought to be proscribed?

(b) How "captive" is the audience of unwilling viewers or listeners? and,

(c) How limited, or significant, in its deterrent effect on uninhibited speech, is the proposed ban?

With these criteria in mind, we return to the Commission's order in this case.

V. IS THE COMMISSION'S BAN LAWFUL?

We have expressed the view that, but for constitutional limitations, the Commission's order would be authorized by Section 1464. But the statute, if it is to survive—as we believe it may—must of course be read to permit only such interference as is consistent with the First Amendment. Accordingly, we test the Commission's order directly under the Constitution, on the assumption that Section 1464 goes to the constitutional limit.

At the outset, we consider whether a *total* radio ban, with no exemption, of the identified "indecent" words would be lawful. In our view, that is not a false question, for several reasons. First, the Commis-

sion as a whole has not finally determined whether to lift its ban for any period, two Commissioners having clearly stated that they would not. Second, the surcease "intimated" in the order is so conditional as scarcely to ameliorate its chilling effect on speech. Third, in our view, the very limited exemption suggested cannot save the ban. And, finally, since the greater presumably includes the less, it is convenient to test the broader proposition first. We shall then examine the effect of a possible time limitation.

A. A TOTAL RADIO BAN

1. It is arguable, of course, that even a total prohibition, limited to a single medium, is no more than a "place" regulation, and therefore is distinguishable from the more sweeping "offensive" language laws condemned in such cases as *Cohen, Brown, Hess,* and *Lewis.* A radio ban, it can be said, will not "have a significant deterrent effect" on protected speech. See *Young, supra,* 427 U.S. at 60.

Proscribing the use of certain words on radio only, does not prevent authors from incorporating them in their scripts for theatre or cinema or nightclub or lecture hall, or including them in printed materials; nor does it deprive the public from hearing them or reading them through all media other than broadcasting. And it goes without saying that, even if they were shunned by professional writers and entertainers and public speakers in other forums, a radio ban against the "indecent" words identified here will not imperil their survival in everyday speech. Thus, it could be

said that banning such words from the airwaves would not significantly affect freedom of speech.

The short answer to this, as the Court has reiterated, is that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163, quoted and applied in *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 556. Besides, although the proportion is small, there are a substantial number in our population who depend almost exclusively on radio for entertainment, and for much else. We need only think of the blind. For them, it is no good saying they can hear uncensored language elsewhere. A radio ban would, for some, have a significant impact.

There is, moreover, another difficulty with the argument. It is that it can be made for each medium and each locale. Forbidding the offensive words at the cinema alone, or at sports events alone, could be claimed to be equally "harmless." If each such ban were viewed in isolation, one could perhaps justify proscribing "indecent" language in every discrete public forum, with the consequence that the words were (legally, at least) confined to the home. That would, of course, be impermissibly expanding the constitutionally limited area of obscenity in all but name. The exceptions would soon swallow the rule which gives constitutional protection to speech which is not obscene.

A prohibition of otherwise protected speech is not permissible under the First Amendment merely because it is limited to certain places or certain times. Every such regulation must be justified by special circumstances. *Erznoznik, supra,* 422 U.S. at 209–212. Accordingly, we turn to examine whether the unique characteristics of the radio medium support a ban on "indecent" words that would not be constitutionally valid elsewhere.

We begin by examining the special considerations identified by the Commission and by Judge Leventhal, dissenting below.

2. *The "scarce medium" and the "public interest."* Like Chief Judge Bazelon (A. 89) and Commissioner Robinson (A. 33 n. 7), we do not appreciate how the character of radio as a medium of "limited access" is relevant here. To be sure, the Court has sustained rules implementing the Commission's responsibility to assure that the limited medium of radio will be used in the "public interest," with "balanced programming" and access, so far as possible, to all points of view. *E.g., Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 397. Those considerations justify the Commission in requiring radio stations to afford air time to differing opinions and might sanction an order compelling a particular station that confined itself to "indecent" programs to diversify. But nothing of the sort is remotely involved in this case.

Nor can the congressional mandate to allocate the airways "in the public interest" (47 U.S.C. 303(g),

307(a) and (d), 309(a)) of itself justify a total ban on any category of protected speech. As we have said (*supra,* p. 19), whatever else the statutory prohibition on censorship means, it cannot tolerate the application of a "public interest" standard in this way, unless there are other compelling reasons.

3. *The "intrusiveness" of radio.* Much has been written about how radio, partly because it is ubiquitous and partly because of the common practice of indiscriminately "flipping the dial," tends to be particularly intrusive.

To be sure, radios today, relatively cheap and portable as they are, can invade any area. Thus, "indecent" words when broadcast may reach the public streets, places of recreation, shops, schools, business offices, private cars and the home. And many unwilling hearers may be offended. Of course, without the aid of radio, the human voice can do the same. But, here, the risk is compounded because the operator of the radio does not customarily consult a guide before scanning the dial, and may, quite inadvertently, subject both himself and those near him to "indecent" language.

This would be troublesome indeed, if the radio receiver, once activated, could not be turned off. But, considering the ease and speed with which the offensive program can be switched off, it is difficult to appreciate why the radio situation is not *less* troublesome than that of the vulgar jacket in *Cohen* or the nude portrayals in *Erznoznik,* as to which the Court reasoned that "the burden normally falls upon the

viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes'." 422 U.S. at 210–211. And see, *id.* at 220–222 (Burger, C. J., dissenting).

What is more, disabling the Commission from banning the broadcast of "indecent" words does not prevent local regulations restricting the time and place where, or the volume at which, radios can be played so as to avoid annoyance to others. Indeed, it may be that a narrowly drawn ordinance can be devised that would prohibit the operator of a receiver from offending more sensitive members of the public by declining to turn off an "indecent" program in identified public locales. Protection of the unwilling audience, and especially of the "captive" audience, does not require a total ban at source.

Nor do we easily appreciate why radio is more offensive than other media because it can enter the home. So can "indecent" publications and even films—not to mention "rough-talking" people. Of course, the special privacy interests of the home justify limited regulations against uninvited intrusions. *E.g., Rowan* v. *Post Office Dept.,* 397 U.S. 728; *Kovacs* v. *Cooper,* 336 U.S. 77. But, except for the fleeting moment when the owner inadvertently tunes in to "indecent" language, the offensive broadcast penetrates the home only by invitation. And, of course, the private home is the one place where even obscenity is beyond the power of government to suppress. *Stanley* v. *Georgia,* 394 U.S. 557.

In our submission, the answer to the intrusion argument is, as this Court has had occasion to notice

in contrasting other messages less easily avoided, that "[t]he radio can be turned off." *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302; *Packer Corporation* v. *Utah,* 285 U.S. 105, 110. Cf. *Rowan, supra,* 397 U.S. at 737. The brief assault on sensibility from an inadvertent sweep of the dial is, after all, confined to *words,* and words by definition not obscene. Coarse language can offend, to be sure. But, it does not have the immediacy of the live image. Different considerations would be presented if we were dealing with an offensive *pictorial* representation on television, the impact of which might be less easy to erase by switching off the set. It is difficult to say the same of one or several "indecent" words, usually employed as mere expletives without specific meaning.

4. *"For the sake of the children."* Finally, and with special emphasis, those who urge a ban, full-time or part-time, on the broadcast of "indecent" words express concern for the children in the audience. For the moment, we address that consideration on the hypothesis that a substantial number of young ears will always be in the audience and that, if they are to be spared "indecent" words on radio, such language must be banned at all times.

The basic difficulty is that it is impossible, as a practical matter, to segregate the radio audience between adults and minors. If that were possible—as it is, in principle, for films and to a lesser extent for publications—an accommodation might be made. Even then, questions would arise about the independent First Amendment rights of minors. See *Erznoznik, supra,* 422 U.S. at 212–214. But, as things are, the in-

evitable effect of a ban aimed at protecting minors is to "reduce the adult population," at least during most waking hours, to hearing on radio "only what is fit for children." *Butler* v. *Michigan, supra,* 352 U.S. at 383. That cannot be squared with the First Amendment.

We have already seen that the Court has firmly settled, in the context of obscenity claims, that the First Amendment rights of adults cannot be abridged for the sake of the children. The same principle holds good when "nuisance" law confronts the First Amendment. Where the two audiences cannot be separated, the presence of children has not changed the constitutional boundary. *E.g., Cohen, supra,* 403 U.S. at 16; *Papish, supra,* 410 U.S. at 676; *Erznoznik, supra,* 422 U.S. at 212–214.

The radio medium is not unique in this respect. The cases just cited illustrate that public buildings and the public streets are not off-limits to the very words involved in this case despite the inevitable presence of young listeners. The Court, moreover, has noted that it is not "realistic" to suppose that pornographic books, magazines and pictures can be kept out of juvenile hands if available to adults, *Slaton, supra,* 413 U.S. at 58 n. 7. And it has expressed doubts about the effective policing of "adult" movie theatres. *Ibid.* But this has not led the Court to read the First Amendment as tolerating a ban on merely "indecent" books, pictures or films. We cannot suppose that the inevitable presence of youngsters in the radio audience is of greater constitutional relevance.

At all events, it may be doubted whether the exposure of juveniles to mere "indecent" words on radio

is, today, a matter of the gravest concern. If one is to follow the Court's realistic approach, it must be conceded that very few contemporary youngsters have not heard and read the same words elsewhere. To be sure, the dissemination of such language on the public airwaves may seem to add a dimension of apparent approval. But parental standards have not lost all their force in correcting any such misapprehension. There are perhaps other aspects of broadcasting that more urgently invoke the Commission's solicitude for the young.

B. THE PARTIAL BAN

Thus, far, we have been addressing the question as though the Commission had banned "indecent" words from radio broadcasting *at all times*. That is, of course, not the case. The Commission, to use its final vocabulary, has at least "intimated" that the offending words might be spoken "when the number of children in the audience was reduced to a minimum," provided "sufficient warnings" are given and provided further the offensive language used is shown to have, in context, "serious literary, artistic, political or scientific value" (A. 43–44). For several reasons, we suggest this very limited exception does not save the Order.

1. We take no issue with the warning requirement, albeit it will presumably be of limited effect in protecting the indiscriminate listener who tunes in too late to hear it.[10] Indeed, practical considerations aside,

[10] In this very case, the offended listener presumably missed the warning that had been broadcast (see A. 3–4). We note, however, that this listener, despite the presence of his young son, apparently did not switch off his car radio until he had heard most, if not all, of the "indecent" words broadcast (see A. 2–3).

a notice rule seems a proper application of the "nuisance" doctrine espoused by the Commission.

But it is not clear whether imposing a condition of "serious" redeeming value—which would immunize even otherwise obscene material—is not too strict a standard for merely "indecent" words. No such qualification has been deemed proper for the use of the same words with respect to any other medium or forum. It may well be that the special problems of radio would justify *some* regulation of *wholly gratuitous* verbal assaults by indecent language. See pp. 40–41, *infra*. But it seems wrong to apply the test of obscenity to what is by definition not obscene.

2. We might object also that the Commission is too vague in defining the "permitted hours" for "indecent" words. We have already noticed that, by putting together disparate references in the order, one may deduce that the ban will last until 10:00 p.m. (*supra*, p. 15). Judge Leventhal, however, would not hold the Commission to that indication (A. 104), and in its brief in this Court, the Commission avoids any express statement as to the exempted time.

To be sure, it is arguable that the question of the exact duration of the ban is not presented here; that it is enough to know that it applied at 2:00 p.m. when the Carlin monologue was broadcast. But, by a parity of reasoning, it could be said that the Court need not consider whether the Commission will, at the end of the day, exclude from its ban *any* period whatever. Yet, it is not obvious how the constitutionality of the prohibition can be determined without knowing its limits, if any.

Moreover, as we have said, the Commission's Order was intended to do more than resolve the particular case then before it. And, in any event, the case now having reached this Court, it is in the interest of all those affected, including the Commission itself, to be told the constitutional ground rules. Accordingly, we shall assume what the Commission "intimated": that the absolute prohibition on the broadcast of "indecent" words continues until 10:00 p.m., after which time the ban is conditionally lifted.

3. In our view, such a very limited exemption does not materially alter the constitutional balance. As has been said, a ban continuing until 10:00 p.m. will effectively censor "indecent" words for most of the adult population with normal sleeping habits. And, at the same time, it will not afford the desired protection for a substantial number of young listeners. What is more, a prohibition lasting into the late evening has the same consequence as a total ban for that large number of radio stations that broadcast only during the day.

The suggested compromise is too grudging, and too arbitrary, to salvage the rule. Nor does it appear to us that any different accommodation in terms of large time periods can be justified. The reason is simply that radio listening by children and adults is not confined to discrete hours of the day or night. Indeed, although we do not have statistics, it would seem probable that most adults, most days, confine their radio listening to the daytime, beginning with the radio alarm and ending with the homeward car journey, turning thereafter to television for broadcast enter-

tainment. Juveniles, on the other hand—except for the very young who presumably do not own receivers—may be assumed to be at school for most of that time during the week-days. They, perhaps more than their parents, turn on the radio in the evening, even the very late evening, if only for popular music.

Plainly, a regulation that posits daytime radio listening by children and evening listening by adults is doing violence to reality. Nor do we believe that evening listening by juveniles is usually supervised by parents. We venture the assertion that most youngsters, by mutual consent, play their radios *out* of the hearing of their parents in the evening—whether at young gatherings out of the home or in the privacy of their own rooms. No doubt, some parents attempt to monitor their children's radio listening, but adult supervision of the portable radio in young hands is not, we suppose, the common experience.

We conclude that an arbitrary day/evening division of the radio audience cannot be squared with the First Amendment.

C. A CAVEAT

Our submission is a narrow one: that Section 1464, construed in the light of the First Amendment, does not authorize the Commission's present attempt to absolutely outlaw certain words on radio, wholly without regard to context, for all or most of the broadcast day. If we are right, that conclusion, without more, requires affirmance of the judgment of the court of appeals, and it is unnecessary to consider what, if any, lesser regulation of "indecent" language might be permissible.

Nevertheless, lest we be misunderstood, we wish to make clear our view that neither the Commission nor the Department of Justice is entirely powerless to deal with extreme cases.

First, of course, there may be instances in which the offending words identified here are used in a context that renders the material obscene. One example is *Illinois Citizens Committee for Broadcast* v. *Federal Communications Commission,* 515 F. 2d 397 (C.A. D.C.). So, also, the Court of Appeals for the Seventh Circuit indicated that the broadcasts on a citizen's band radio involved in *United States* v. *Simpson,* 561 F. 2d 53, could have been punished as obscene. *Id.* at 55 n. 1.[11] But we do not stop there.

Notwithstanding the ruling in *Simpson,* we believe the separate statutory prohibition on "indecent" language survives. In our view, that provision, read in light of constitutional limitations, authorizes the imposition of sanctions upon the radio broadcast of the words involved here when, in context, although they do not appeal to prurient interest, they are directed *at* any person, or at the audience generally, in a deliberately hostile manner, or when they are uttered,

[11] The court's opinion describes the broadcasts in this way: "Simpson used the citizens band radio transmitter in his home to broadcast explicit references to sexual activities, descriptions of sexual and excretory organs, and abusive epithets directed to other radio operators with whom he was communicating, all in street vernacular. [and] [h]is broadcasts were received not only on citizens band radio but on AM radio, television, and telephones" (561 F. 2d at 55). On the evidence, the court concluded it "would have had no difficulty in affirming a finding that the language was obscene," but was bound by a jury verdict that the broadcasts were "indecent" only and not "obscene" (*id.* at 55 n. 1).

not innocently or merely for emphasis, but are spewed forth without any arguable justification in a conscious attempt to shock, offend or outrage. However rare such instances on commercial radio, we suggest Section 1464 yet affords a useful residual power to deal with extreme cases of this kind.

Finally, although the situation is not remotely presented here, we are, at least tentatively, persuaded that the Commission might properly prohibit the inclusion of the offending words in any radio broadcast *specifically directed at younger children,* regardless of when broadcast. No doubt any such rule would present definitional problems. These are, of course, best left to the expertise of the agency, in the first instance. But, for our part, we would not discourage the attempt to fashion such a narrowly drawn regulation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.77-528

Federal Communications Commission,
Petitioner,

v.

Pacifica Foundation,
Respondent,

ON WRIT OF CERTIORARTI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC.
AS
AMICUS CURIAE

INTEREST OF AMICI

Morality in Media, Inc. as Amicus Curiae, files this brief in this case,

which is before this honorable Court on the merits, under the provisions of Rule 42 (2). The written consents of the petitioner and respondent have been requested and both parties have consented in writing. Copies of such consents are being filed with this Court concurrently with this brief.

Morality in Media, Inc., is a New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states. It corresponds 8 times a year with over 50,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessman, clergy and civic leaders. Its national headquarters is located at 487 Park Avenue, New York, New York 10022.

The President of Morality in Media, Inc., is Reverend Morton A.Hill S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C.Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity

and Pornography"[1]

Morality in Media, Inc., files this brief supporting the position of the Federal Communications Commission because it believes that the decision in this matter will be of grave importance to the men, women and children who comprise the listening audience of the United States and may impact just as strongly on the rights of those who comprise the audiovisual television audience.

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1. The "Hill-Link Minority Report" was cited by this honorable court in Kaplan v. California 413 U.S.115, at 120 n.4 93 S.Ct.2680, 2684 n.4, 37 L.Ed.2d 492 (1973). Paris Adult Theatre I. v. Slaton, 413 U.S. 49 at 59 n.7 and n.8, 93 S.Ct.2628 at 2635 n.7 and 8, 37 L.Ed 2D 446 (1973)

SUMMARY OF ARGUMENT

I.

Amicus contends that the definitions of "obscene" and "indecent", as used in 18 U.S.C.1464, are colored and gain meaning from the "setting" or media in which they are used; That the fact that radio communication reaches into the privacy of the home, affects children and also affects unwilling, unsuspecting (and to a degree) captive auditors, requires definitions that vary from those used by this Court in Miller v. California. In addition, Amicus argues that where, as here, the use of scurrilous language is willful and calculated to offend, a different test than Miller should be applied. Amicus points out that offensive words were used over 100 times in an eleven minute forty-five second broadcast , making it impossible for a newly tuned auditor to avoid being exposed. Amicus makes it clear that neither Hamling nor 12 200 Foot Reels has construed 18 U.S.C.1464 as requiring the application of Miller standards to radio broadcasting, but on the contrary restricted that application to other sections of the code. Finally, as to this point, Amicus notes that the word "Indecent" traditionally has had a different meaning from the word

"Obscene". Amicus then observes that the "focus" in 1464 is not on "Obscenity" but on "Obscene or Indecent or Profane Language" indicating a congressional intent thet "language" is the key word in 1464 -that the application of Miller tests would destroy the intent of the statute in this regard, since it is quite clear that "Obscene Language" and "Indecent Language" normally cannot be "Obscene" in the Miller sense.

II.

In its second argument Amicus distinguishes Cohen v. California and similar cases as being inapplicable because the privacy of the home was not being invaded.

III.

Amicus goes on to demostrate that the compelling interest of protecting the privacy of the home can be bolstered by a legitimate but limited concern for the welfare of children, where the rationale of the proscription has such mixed elements in its constitution. Under such circumstances, the contention is made that reasonable time, place and manner restrictions may be placed on the exercize of First Amendment rights.

IV.

The next point developed is the

argument that the F.C.C. restrictions or any Federal statute or regulation, is not overbroad if it can be subjected to a limiting construction. Amicus claims that it was the duty of the Lower Court and within the province of this Court to so construe the F.C.C. rules since they are capable of being so construed to avoid vagueness and overbreadth, if any.

V.

Finally, Amicus postulates that the F.C.C. Rules further substantial and compelling governmental interests unrelated to free expression. These are the prevention of intrusion into the privacy of the home, the welfare of children, the concern of parents for that welfare, the quality of life, the total community environment and the "survival of civility". It is demostrated that it is not the "expressive content" but the intrusion that is being proscribed and that the determination to make such a prohibition is bolstered by these other legitimate and "compelling" governmental concerns.

Amicus concludes that the Miller standards insofar as they permit patently offensive descriptions and

depictions, even in the presence of "serious value", are inappropriate for application to radio or to 18 U.S.C.1464 generally. In fact, Amicus claims, that such application would be intolerable to the American public.

Finally, it is observed that any requirement that a householder must "turn off the radio" or "change the station" in the privacy of his or her home, mandates an unwarranted affirmative act involving the compulsion to use the mind, the senses, the arms, the legs and most of the muscles in the body. This differs sustantially from an almost imperceptible movement of the muscle controlling the lateral motion of the eye.

ARGUMENT

I.

THE WORD "INDECENT" IN 18 U.S.C. 1464 NEED NOT BE CONSTRUED TO BE SYNONYMOUS WITH "OBSCENE" AS USED IN MILLER v. CALIFORNIA

Any study of the variable meaning of the words "Indecent" and "Obscene" as colored by the "setting" or "media" in which they are used, should begin with the pronouncements of this honorable court in Erznoznik v. City of Jacksonville,[2] since it is there that we find the distinctions that may be controlling in this case. In Erznoznik we find the following:

> "When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power" (citing cases) ... "Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see Rowan v. Post Office Dept.[3], or the degree of

2. 422 U.S.205 (1975)
3. 397 U.S. 728 (1970)

> captivity makes it impractical for the unwilling viewer or auditor to avoid exposure..." (emphasis added)

The Erznoznik Court, in foot note 4 states relative to Rowan:

> "The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"

This same Court further elucidates the degree to which "Speech" may be regulated and censored when at foot note 5 it says:

> "In Lehman[4], the Court sustained a municipality's policy of barring political advertisements ... the plurality and concurring opinions recognized that the degree of captivity and the resulting intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street ..."

4. Lehman v. City of Shaker Heights, 418 U.S. 298, 305 (1974)

Again, at foot note 6, Erznoznik assists us to understand what may be proscribed as "Indecent Speech" without violating the First Amendment:

> "It has also been suggested that government may proscribe, by a properly framed law, 'The willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience'" (emphasis added) ... "Rosenfeld v. New Jersey"[5] ..."In such cases the speaker may seek to force public confrontation with the potentially offensive aspects of the work" ... "It may not be the content of the speech as much as the deliberate 'verbal (or visual) assault' Rosenfeld, supra... that justifies proscription. See Redrup v. New York"

Chief Justice Burger, in a dissent in Erznoznik, (in which Justice Rehnquist concurs) quoting from Kovacs[6] reminds us that:

> "Members of this Court have cautioned that every medium of communication 'is a law into itself'"

Erznoznik also suggests, supra, that

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5. Rosenfeld v. New Jersey, 408 U.S.901, 905 (1972)

6. Kovacs v. Cooper, 336 U.S.77 at 97 (1949)

we see Redrup v. New York, 368 U.S. 767, at 769. Adverting to that case we find the oft-quoted language reading as follows:

> "In none was there any suggestion of an assault upon individual privacy by publications in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf.Bread v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 930, 98 L. Ed.1233; Public Utilities Commission of D.C. v. Pollack, 343 U.S.451, 72 S.Ct. 813, 96 L.Ed.1068"... "and in none was their evidence of the sort of 'pandering'; which the court found significant in Ginzburg v. United States, 383 U.S.463, 86 S.Ct.942, 16 L.Ed. 2d. 31."

Amicus suggests that the lesson of Erznoznik is as follows:

"Offensive" language not meeting the three pronged test of Miller v. California[7] may be proscribed under the following circumstances:

1. Where there is a properly constructed rule evidencing a limited concern for juveniles.
2. Where there is an assault upon individual privacy by publica-

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7. 413 U.S. 15 (1973)

tion in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.
3. Willful use of scurrilous languale calculated to offend the sensibilities of an unwilling audience.
4. Where the speaker intrudes on the privacy of the home.
5. Where there is evidence of pandering.

It appears clear from the record in the instant Pacifica Foundation case that many of the elements which permit the Government to proscribe "Indecent Speech" without requiring that such speech be "obscene" in the Roth-Miller sense are present.

A. There was an assault on individual privacy in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.

This appears clear from the fact that any listener who first tuned in during almost any segment of the eleven minute forty-five second broadcast, would have his sensibilities assaulted by words commonly considered to be offensive. If the transcript of "Filty Words" (Pet.App. B p 74 to 79) is examined, we find 165 lines averaging about 10.2 words

to a line. of these 165 lines[8], 84 lines have offensive words or phrases. Pages 77 and 78 each have 24 offensive lines out of 38. If it took 11 minutes and forty five seconds for the transcript of 164 lines, each line was enunciated on the average in a 4.⅛ second time frame. Anyone tuning in his or her radio any time during the narrative described on pages 76, 77 or 78 would be assaulted during this period with an offensive word on, practically, every line. Such a time frame makes it impossible for an unwilling individual to avoid exposure. It is of no help to such a person who turns on his or her radio during this period that there was a warning at the begining of the program. No attempt was made during the playing of the record to warn unwilling individuals. Nor should a person in the privacy of his home or car be required to flip the dial. On the contrary, he has a right not to have his privacy invaded by "intrusive offensiveness" on the air waves. Compare State v. Boyd, 35 Ohio App2d 147, 300 N.E.2d 752, 759 (1972)

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8. The word S--t was used 70 times. The word F--k was used 31 times. The word C-s-k was used 2 times. The words M-f and T-t were used 2 times and the words P--s and C-t were used once. 1687 words are used in the monologue.

B. Willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

There does not seem to be any doubt from the record that the action of WBAI was willful (Pet.App.B,72), that it was scurrilous (Pet.App.B,74 to 79), or that it was calculated to offend the sensibilities of an unwilling audience since "listeners were advised that it included sensitive language which might be regarded as offensive to some" (Pet.App.A,p.2) and the record stated that he, Carlin, had been thinking about the words you could not say on the public...airways (Pet.App.B,p.65). Pacifica itself characterized the George Carlin Album as one that was calculated to offend when it said, in response to an inquiry from the FCC, that "George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to iluminate" (Pet.App.B,p. 67). It was an unwilling audience since anyone tuning in was immediatly and continually assaulted. If they "flipped the dial" to prove their unwillingness, nevertheless the offense had been committed. It was a "fait accompli". This deliberate willful use of repeated scurrillous language amounts to conduct not just speech and may be suppressed. Cf United States v. O'Brien, 391 U.S.367 (1968). It is noted that the "speech" came from a

record which someone in WBAI "played".

C. The speaker intrudes on the privacy of the home (Cf.Pet.App.B.p 87 n 8) See Bread v. Alexandria 341 U.S. 622 (1951)

It should be observed that Erznoznik at foot note 4, supra, quoting Rowan says that:

> "Individual privacy is entitled to greater protection in the home than on the streets"

It follows then, that if "Intrusive Offensive" radio shows are invasions of the privacy of the home, then they are more easily proscribable than the use of indecent speech in public, which long has been subject to proscription by the various states. While it is time that the United States Supreme Court has reversed convictions under such statutes, "It did so, not out of any solicitude for intemperance, but because the law under which the convictions were obtained was drawn in such a way that law abiding citizens could have been convicted under it."[9]

D. Evidence of Pandering: The 'leer of the sensualist' permiates the

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9. Spears v. State 337 So.2d 977, 980 (Fla.,1976)

George Carlin album. His sole emphasis is on the sexually provocative. He sets out to be indecent. He means to provoke and titilate. Cf. Ginzburg v. United States[10]

Pacifica argues (Pet.App.A p.5) that the term "indecent" as used in Federal Statutes must always be synonymous with obscene, quoting Hamling v. United States 418 U.S. 87 (1974), and United States v. 12 200 Foot Reels 413 U.S.123 (1973) It is sufficient to say that there is no such general language in either of these cases. What the Hamling Court said (quoting 12 200 Foot Reels) at 418 U.S.113, was as follows:

> "If and when such a 'serious doubt' is raised so to the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'inmoral' as used to describe regulated material in 19 U.S.C #1305 (a) and 18 U.S. C. Sec.1462 ... we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California"...(emphasis added)

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10. 383 U.S. 463 (1966)

It needs no additional argument to note that there is no reference as to how the Surpeme Court would construe the terms "obscene" or "indecent" found in 18 U.S.C 1464. The omission was, no doubt, intentional. 12 200 Foot Reels did not construe the sections mentioned. Nor is Pacifica's case assisted by the statement in Hamling at 418 U.S.115 that

> "United States v. 12 200 Foot Reels of Film, made clear our willingnes to construe federal statutes dealing with obscenity to be limited to material such as that described in Miller"

since in this context Hamling was construing Section 18 U.S.C. 1461 (relating to mailing of obscenity) and the reference to 12 200 Foot Reels was "as noted above" to 1305 and 1462.

Again, if we refer to 418 U.S.113, we find the following:

> "Miller undertook to set forth examples of the types of material which a statute might proscribe ... as noted above, we indicated in United States v. 12 200 Foot Reels ... that we were prepared to construe the generic term in 18 U.S.C.1462 to be limited to... that specific 'hard core' sexual conduct given as examples in Miller ... we now so construe the companion provision in 18 U.S.C. 1461" (emphasis added).

It should also be noted that Hamling and 12 200 Foot Reels rely for their authenticity on Miller but Miller on two occasions draws our attention to Bread v.Alexandria,[11] where First Amendment rights were required to give way to the superior right of privacy of the home.[12]

The fact that this Court has construed 18 U.S.C.1461 and its companion statute, 18 U.S.C.1462 as proscribing only hard-core depictions or descriptions does not require similar construction of the phrase "obscene", "indecent" or "profane language" found in 18 U.S.C.1464. As was said in United States v. Musgrave[13]

> "In construing statutes, the well established rule is where the language... is clear and free from ambiguity, the duty of the court is to enforce it as it is, as there is nothing to construe. Thornley v. United States, 113 U.S.310..."

The focus in 18 U.S.C.1461 is on "obnoxiously debasing portrayals of sex" based on a consistent interpretation of that statute reaching back to

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11. 341 U.S.662 (1951)
12. 413 U.S. at 19 and 34
13. 160 F.700, 703 (E.D.Ark.1908)

United States v. Bennett[14] decided in 1879, (long before radio and T.V. were invented). Hamling[15] similarly construes 18 U.S.C.1462[16] where the court court refers to "representations or descriptions". This differs significanly from 18 U.S.C.1464 where the focus is on "Obscene, Indecent or Profane Language" The caption of 1464 is "Broadcasting Obscene Language". We are therefore not concentrating in this legislation on descriptions or depictions which must be "taken as a whole" and tested for serious value, but on the use of spoken words. Our attention is riveted on "Obscene Language", "Indecent Language" and "Profane Language". These phrases were not unknown to our common law.[17] Such phrases certainly include single

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14. 24 F. Cas.1090 (1879)
15. Hamling 418 U.S. at 112
16. Hamling at p 113-114
17. Bell v. State, 31 Tenn.42 (Tenn.1851) Dillard v. State of Georgia 41 Ga.278, (Ga.1870), Weaver v. State, 79 Ala.279 (Ala. 1885). "From time immemorial it was an offense at common law to utter obscene language in public places, near a dwelling house or in the presence of women", Knowles v. United States 170 F.409, 412 (8th Cir., 1909)

words, epithets and short phrases.[18] It appears inconceivable that a single word or short phrase "Taken as a Whole" can appeal to pruriencey and demonstrate lack of serious value.[19] The three pronged tests were built up for obscene literature[20], not "Obscene Language" or "Obscene Speech". What then are we to say, that we cannot give effect to the intent of Congress in enacting 18 U.S.C.1464 because single words cannot be prurient?

It is plain that the words "Obscene" and "Indecent" are not synonymous. "Indecent" has been variously defined as "unbecoming", "inmodest", "unfit to be seen". United States v. Bennett. The term is said to signify more than

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18. Cf. State v. Chrisp, 85 N.C.528; State v. Burke, 154 S.E.747 (No.Car.1930); Dupree v. State, 22 S.E.2d 33 (Ga.App.1942); Ricks v. State, 28 S.E.2d 303 (Ga.App.1943. Cf. People v. Cuomo, 335 N.Y.S.2d 219 (N.Y.Crim.Ct.1972)

19. "It cannot plausibly be maintained that this vulgar allusion to the selective Service System would, conjure up some psychic stimulation"... Cohen v. Cal.403 U.S.15, 20. An unspeakable and repulsive epithet could not, in any conceivable way, be said to be likely to suggest or convey lewd or lascivious thoughts. United States v. Benedict, 165 F.221 (S.D.N.Y.1908)

20. Cf. Roth v. United States, 354 U.S.476 Fn.26.

indelicate and less than immodest -to mean something unfit for the eye or ear- United States v. Loftus 12 F. 671 (D.Ore.1882); "unfit to be seen or heard", United States v. Bebout 28 F.522(W.D.Ohio 1886) "that which shocks the ordinary and common sense of men as indecency", United States v. Davis 38 F.326 (W.D.Tenn., 1889); Indecency implies great unseemliness or gross offensiveness, especially in reference to sexual matters. Websters Seventh New Collegiate Dictionary G & C Merriam Co. The word "Obscene" of course, is defined in Miller v. California.

II

COHEN v. CALIFORNIA AND SIMILAR CASES DO NOT PRECLUDE PROSCRIPTION OF OFFENSIVE BUT NON-"OBSCENE" SPEECH ON THE AIRWAVES

Cohen v. California[21] has no precedental value in the instant matter since that Court carefully noted that it was not dealing with a situation involving invasion of the

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21. 403 U.S. 15 (1971)

privacy of the home[22] (where different rules apply), nor was the issue of the privacy of the home involved in any of the following cases, where "offensive" speech was held protected:

1. Papish v. Board of Curators of University of Missouri
410 U.S.667 (1973)

2. Jacobs v. Board of School Commissioners
490 F.2d 601 (7th Cir.1973)

3. Gooding v. Wilson
405 U.S. 518 (1972)

4. Cason v. City of Columbus
409 U.S. 1053 (1972)

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22. "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannct be totally banned from the public dialogue... we have at the same time consistently stressed that 'we are often captives' outside the sanctuary of the home and subject to objectionable speech". (emphasis added) "Walking through a Courthouse ... is nothing like being free from unwanted expression in the confines of one's own home" Cohen v. California 403 U.S. at 21 (1971)

5. Rosenfeld v. New Jersey
408 U.S. 901 (1972)

6. Lewis v. City of New Orleans
408 U.S. 913 (1972)

7. Hess v. Indiana
414 U.S.104 (1973)

8. Coates v. City of Cincinatti
402 U.S.611 (1971)

9. Terminello v. Chicago
337 U.S. 1 (1949)

10. Brown v. Oklahoma
408 U.S. 914 (1972)

It may also be noted that, the remark in Cohen to the effect that in order to prohibit obscene expression, such expression must be in some significant way "erotic", has no particular application to the instant case, since the focus here is on "Indecent", not "obscene".

The Court of Appeals[23] relies heavily on Erznoznik, but that reliance insofar as the aspect of unwilling audition is concerned, may be misplaced since Erznoznik, at footnote 6, states "Appellant is not trying to reach,

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23. (Pet.App.A p.1 at 13, 14, 32 and 33)

much less shock, unwilling viewers"...

III

THE RIGHT OF THE GOVERNMENT TO REGULATE INDECENT BUT NON-"OBSCENE" LANGUAGE USED ON THE AIRWAVES AS AN INVASION OF PRIVACY MAY BE BOLSTERED BY A CONCERN FOR EXPOSURE TO CHILDREN

The state under its parens patriae jurisdiction has inherent power to regulate where the welfare of children is involved Prince v. Massachusetts, 321 U.S.158. It is also true that the state cannot reduce the adult population to reading what is only fit for children Butler v. Michigan, 352 U.S. 380. "Speech that is neither obscene as to youths, nor subject to some other legitimate proscription, cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them Erznoznik v. City of Jacksonville, 422 U.S.205, at 213(1975) (emphasis added)

Implicit in this statement of Erznoznik is the concept that a legislative body may, where speech is subject to other legitimate proscription, take into consideration the protection of youth. This concern goes

into the balance along with others and may be sufficient to tip the scale. The F.C.C., in addition to its concern for children, noted "brodcasting's uniquely intrusive qualities." In Close v. Lederle, 424 F.2d 988, 990 (1st Cir.1970) the Court, quoting Redrup, noted that the University of Massachusetts had a right to protect "assault's upon individual privacy" and the reasonableness of the University's action "was bolstered by the fact that children regularly used that particular corridor where the offensive materials had been displayed".[24] As was said in Young v. American Mini Theaters[25] "reasonable regulation of time, place and manner of protected speech where...necessary to further significant governmental interest are permitted by the First Ammendment."

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24. State v. Rabe, 484 P.2d 917, 924 Wash. Sup.Ct.(1971) reversed on other grounds sub nom. Rabe v. Washington, 405 U.S.313 (1972

25. 427 U.S. 50, 63 n.18 (1976)

IV

THE F.C.C. REGULATION IS NOT OVERBROAD

An overbroad regulation is one for which there is not a valid construction which avoids abridgement of first amendment rights.[26] A federal court may construe or interpret a federal statute or regulation to avoid vagueness or overbreadth.[27] As was said in United States v. 37 Photographs, 402 U.S.363, at 369;

> "We must remember that when the validity of an act of Congress is drawn in question and a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible where the question may be avoided..."

If there are infirmities in the F.C.C. Regulation, or in the meaning

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26. Jacobs v. Board of School Commissioners S.490 F.2d 601, 605 (7th Cir.1973)

27. Id. a Page 606 Cf. Erznoznik at 422 U.S.205, 216 (1975)

of the statute, which require construction, this Court may apply such a construction as will eliminate problems of vagueness and overbreadth. It could, for example, construe the meaning of the word "children" and the phrase "when the number of children in the audience is reduced to a minimum".

In addition it might formulate a four pronged test for "Obscene" and "Indecent Language for Broadcasting" perhaps as follows... "The test shall be,

(a) A deliberate use
of
(b) Language or words describing sexual or excretory organs or functions which are
(c) Grossly offensive to generally accepted standards of decency for the Broadcast media and have been
(d) Specifically so declared by Federal Communications Commission Rules, Regulations or Decisions or by Federal Law as written or construed."

Such a "test" as Amicus suggests, may perhaps avoid any overbreadth and, at the same time, avoid the dilemma

posed in Cohen[28] of "boundlessness" due to lack of criteria to determine what words may be banned. Here too, the number of words restricted under the suggested test, would, probably, be limited to the ten found in the Carlin Album that fit the test.[29] Surely, this is a small price to pay for the survival of civility. Such a test would not be subject to the infirmity found in Erznoznik of innocent depictions of nudity. In Cohen, the only conduct the state sought to punish, was the act of communication. In Pacifica, it is the deliberate intrusion into the home that forms the basic rationale of the proscription, in addition to the protection afforded to youth.

V

THE F.C.C. REGULATION FURTHERS AN IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST THAT IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION

Various of the governmental interests spelled out to justify

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28. Cohen v. California 403 U.S. 15, 25

29. These words are S-t, F-k, M-f, P--s, C-s, T-t, C-t, T-d, t--T and F-t. (Pet.App. B p.74 to 79)

the validity of obscenity legislation, are equally applicable to "Indecent" Broadcasting. These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and possibly, the public safety itself, see Paris Adult Theatre I v. Slaton 413 U.S.49, at 58.

"Rights and interests other than the advocates are involved." Bread v. Alexandria. 342 U.S.622 (1951). In Erznoznik the rights of the audience to attend a motion picture of their choice was involved. In Pacifica, that audience is the American listening public. The law protects the home against unwanted intrusions and not just intrusions by expressive language.[30]

Slaton quotes Professor Alexander Bickel to the effect that

> "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear, (which in truth we cannot) what is commonly read and seen and heard and done intrudes upon us

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30. Cf. The Supreme Court 1974 Term, Harvard Law Rev.Vol.89:47 p.129 F.n.53

all, wanted or not..."[31]

Professor Bickel, in 1974 writing, in "Where Do You Draw the Line?",[32] elaborated on this thought when he wrote:

> "Even speech, which advocates no ideas, can have its consequences. It may inflict injury by its very utterance as the Court said a generation ago, in the Chaplinsky case of lewd or profane or fighting words. More and equally important, it may create a climate, an environment in which, conduct and actions that were not possible before, become possible"

Irving Kristol writing in the same publication[33] puts it thus

> "What is at stake is civilization and humanity, nothing less.. the matter of obscenity and pornography is not a trivial one."

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31. Paris Adult Theatre I v. Slaton 413 U.S. at 59.

32. Brigham Young University Press, Edited by Victor B.Cline (1974) at page 72.

33. Id. at page 51 -see also reference to "Where Do You Draw the Line"- in Petitioner's Appendix B, page 90.

Mr. Kristol also says:

> "It is no accident that in the history of all literatures, obscene words -the so called- 'four letter words', have always been the vocabulary of farce or vituperation. The reason is clear, they reduce men and women to some of their mere bodily functions -they reduce men to his animal component- and such reduction is an essential purpose of farce or vituperation."

The last quotation we shall take from Where Do You Draw the Line?, is from an article entitled "Obscenity Law and the Supreme Court", written just after the Miller decision, reading as follows:

> "Literally, the quality of lack of serious value, which obscenity must have means, that even where you have pruriency (appeal to lust), and patently offensive hard-core sexual conduct specifically defined, it is legal to publish or present it, if the work has serious literary or artistic

value. Let us now apply that concept to a form of media, for example, television (in color). Does not the Supreme Court opinion say that you can present explicit hard-core sex or bestiality on T.V. if, the 'play' or 'film' or 'live performance' has literary or artistic value? It would appear that most Americans, obviously would not tolerate this. While they might tolerate these distinctions in books, magazines, or even motion pictures, they would not tolerate the concept that they must switch the dial to avoid such performances on T.V. or radio or that they must be concerned that their minor children may be exposed to the Same."

"From this exposition, it is quite obvious that different standards must be applied to T.V., radio ... Television and radio communications, certainly partake of the nature of a public access thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on T.V. and radio. ... These programs come into the home, and under the doctrine of Bread v. Alexandria,

341 U.S.622 (1951), the usual broad play afforded free speech may be curtailed... The new definition of obscenity cannot be practically or feasibly extended to radio or T.V. in its present form."

"What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? ... We suggest that the quality involved is "Intrusiveness" (as in Bread). Where this quality is present, obscenity vel non need not be proved. Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance so too he is entitled to 'flip the dial' without viewing intrusive nudity or explicit hard-core sex. Is he supposed to review the program for 30 minutes or one hour to determine if the work 'taken as a whole' has artistic, literary, political or scientific value? Most probably, the Supreme Court did not intend this result and is awaiting the opportunity to correct this deficiency as soon as a proper case in this area presents itself for adjudication. In the meantime,

we are left with this anomaly."[34]

It is observed in passing that in protecting the compelling interests, the F.C.C. has intruded on normal First Amendment Rights only to the extent necessary to achieve the desired protection. It has not banned scurrilous speech from the "Air-ways" entirely, it has established time, place and manner regulation. Reasonable regulation of the time, place and manner of protected speech where these regulations are necessary to further significant governmental interests, are permitted by the First Amendment.[35] The banning of "Ten Dirty Words", will not have a "significant deterrent effect" on the presentation of programs protected by the First Amendment -see American Mini Theatre- 427 U.S.50, at 60.

It is intolerable to suggest that a householder or parent or child must change the station. Does this affirmative act, this bow to the triumph of scurrility, really further

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34. Where Do You Draw the Line, p.102-103 -Article by Paul J.Mc.Geady, Esq.,- of Counsel on this Brief.

35. Young v. American Mini Theatre, 427 U.S.at 63 n.18.

respect for the First Amendment? The reference in the Circuit Court below, concurring opinion, to Lehman v. Shaker Heights[36] to the fact that the "radio can be turned off" cannot by any stretch of the imagination be considered a precedent or a pronouncement of the United States Supreme Court that an auditor of a radio program or the viewer of a T.V.program must avert his ear or eye. An examination of Lehman shows that this quotation originated with the case of State v. Packer Corporation 297 P. 1013, 1019 (1931) and had nothing to do with 18 U.S.C.1464 or radio, but related to the regulation of tobacco advertising and was used to illustrate the simple fact that it is possible to turn off radio advertising but not so billboard advertising. This was its only purpose and it is valueless as a precedent in the instant case.

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36. Pet.App.A p.15

CONCLUSION

For the foregoing reasons, the decision in the United States Court of Appeals for the District of Columbia is erroneous. The F.C.C.did not violate Section 326 because such prohibition refers only to interference with "the right of free speech by means of radio communication." Such did not occur in this case, nor is F.C.C. Regulation vague or overbroad, since a Federal Regulation is not such if the Federal Courts may, by appropriate construction, avoid that result. The Lower Court should have used its powers to accomplish that end.

The Circuit Court should be reversed and the case remanded for further proceedings, not inconsistent with the opinion of this Court.

DATED: February 17, 1978.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

vs.

PACIFICA FOUNDATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Brief Amicus Curiae of Writers Guild of America, West, Inc., in Support of Respondent.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Brief Amicus Curiae of Writers Guild of America, West, Inc., in Support of Respondent.

Pursuant to Rules 35 and 42(2) of the Rules of this Court, the Writers Guild of America, West, Inc. (sometimes referred to simply as "WGA" or "Guild"), respectfully files its Brief Amicus Curiae herein in support of Respondent (Pacifica Foundation). The written consents of all parties hereto are concurrently filed with the Clerk of the Court.

The Guild is the collective bargaining agent of writers employed by producers for the purpose of preparing literary material for entertainment motion pictures, television, and radio. The Guild has collective bargaining agreements with producers of films produced for or exhibited over television and with the three major radio

networks. It respectfully appears here to urge in behalf of writers that society's interest in permitting the fullest freedom to literary creativity requires that the Order of the Commission be reversed and the judgment of the Court of Appeals be affirmed.

I

To Forbid the Use of Words Is to Forbid the Expression of Ideas and Feelings.

The First Amendment and society's intellectual and emotional health require that there be no prohibited index of words. A writer creates only with words. To inhibit his choice of words inhibits his ideas and creativity and constricts the area of communication and expression in society. Indeed, words are the longest lived monuments and embodiments of the thoughts and feelings of mankind. They are the form in which the highest and lowest of human aspirations, ideas, and feelings have been preserved.

Words themselves, we submit, are chameleon in character, and unless they are used in an obscene work they are free to be used as the writer chooses.[1] His work endures, if it does, because he has preserved for others his ideas and feelings in such form and words that move readers or listeners to reread his works. It is precisely because words lie at the very center of the mysterious processes of creativity, communication, and understanding, and because they have a changing life of their own in the minds of men, that proscriptions of particular words cannot and should not be permitted in this society.

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[1]It is an obscene *work as a whole,* and not the individual words therein, which is not protected by the First Amendment. *Miller v. California* (1973) 413 U.S. 15, 24.

> "Scientists will have rifled the secrets of the moon and of Mars long before they will know the secret and subtle workings of the myriad minded force which shapes the course of language." John Moore, English novelist, You English Words, Lippincott, 1961, quoted in Contemporary Quotations, compiled by James B. Simpson, Galahad Books, New York, 1964, p. 357.

Even where the First Amendment has not been involved, this Court has recognized the living, changing character of words:

> "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense." Marshall, C.J., in *McCulloch v. Maryland* (1819), U.S.) 4 Wheat. 316, 414, 4 L. Ed. 579, 603.
>
> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary in color and content according to the circumstances and time in which it is used." Holmes, J., in *Towne v. Eisner* (1917) 245 U.S. 418, 425, 62 L. Ed. 372, 376.

Where the case has been fought on the terrain of the First Amendment, the Court has been more eloquent. It has recognized that words communicate ideas and emotions, and that the communication of both is and must be protected. "Fuck the Draft" has entered into our language, despite the expletive and despite the view of many that the four letter word should not be spoken. The reason is that "Fuck" in its pejorative sense was the appropriate word for the expression and communication of the utterer's ideas and feelings.

See Justice Harlan's language for the majority in *Cohen v. California*, 403 U.S. 15, 26 (1971), quoted at greater length in our Conclusion. As he states, "linguistic expression . . . conveys not only ideas . . . but otherwise inexpressible emotions as well. . . . We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."

II

It Is Impermissible for the FCC to Censor Material on the Ground of Content or to Discriminate on the Basis of "Taste".

We believe that the Carlin monologue, through satire and exaggeration, makes the very serious point that if an idea can be expressed "decently", it is irrational to condemn a word because that word is more pungent in expressing the same idea. John Locke long ago made a similar point this way:

> "We should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves." An Essay Concerning Human Understanding (1690), 3.10.[2]

The Commission's reaction is to the words, and not to the ideas. The Commission analogizes to the law of nuisance and speaks of "a pigsty in an inappropriate place." (App. p. 14.)[3]

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[2]In the same essay, Locke wrote:

"Words, in their primary or immediate signification, stand for nothing but the ideas in the mind of him who uses them." 3.2.2.

[3]The Commission's language in its paragraph 11 is as follows: "11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by

We respectfully submit that it is constitutionally unseemly as well as flatly violative of the First Amendment to equate the principles which apply to free speech with those which govern property nuisances.[4] The *content* of expression is open to scrutiny only in cases of obscenity and defamation. In *Branzburg v. Hayes* (1972) 408 U.S. 665, where the Court refused to recognize an absolute privilege on the part of newsmen to withhold identity of confidential sources before grand juries, the Court stated:

> "Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such 'sham' newspapers would be easily distinguishable, yet *the First Amendment ordinarily*

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principles which are analogous to those found in cases relating to public nuisance. *Williams v. District of Columbia*, 136 U.S. App. D.C. 56, 419 F.2d 638 (*en banc* 1969); *Von Sleichter v. United States*, 153 U.S. App. D.C. 169, 472 F.2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. . ."

[4]The creative writer's reaction to censorship has been stated many times. Most recently, in the play "First Monday in October", by Robert E. Lee and Jerome Lawrence, two Justices of this Court who never lived except in the words and imagination of the writers and in the eyes and imagination of the audience, discuss whether obscenity is protected by the First Amendment:

> "Justice Loomis: Any outrage, any obscenity is permitted? Justice Snow: Censorship is an outrage. Censorship is an obscenity." (Act 1.)

This Court has not followed the absolutist First Amendment position of Justices Black and Douglas; it has held obscenity to be beyond the protection of the First Amendment. The case at bar, however, is naked censorship of "indecent" words where obscenity and prurient interest are not and cannot be found.

prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications *regardless of their* motivation, orthodoxy, truthfulness, timeliness or *taste.* [citations omitted] By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." (footnote 40, 408 U.S. at 705, 33 L. Ed. 2d at 653.)*

In short, it is impermissible to inquire into content and to discriminate on the basis of "taste." If a matter is not obscene, and the Commission concedes the Carlin material is not, then whether under a lesser standard the matter is "indecent" is a matter of "taste," and a governmental judgment thereon is prohibited.[5]

The Commission's order clearly violates the right of adult listeners (and also, we submit, of teenagers and other children) to hear a diversity of programs and flies in the face of 47 U.S.C. § 326, which provides:

"Nothing in this Act [The Communications Act of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted

*Emphasis has been added to quotations unless otherwise indicated.

[5]We also submit that there are constitutionally insurmountable difficulties to a governmental agency determining what is or is not "indecent" language and regulating communication on that basis. We respectfully suggest that of the seven words condemned by the Commission, two are probably not "indecent" in much if not most of our society today. We refer to "piss" and "tit", which we believe are respectively utilized substantially as frequently as "urine" and "breast". And certainly the connotation of some of the other proscribed words are wholly different in the ghetto than they are in the Commission's offices. It the Commission to become a Comstock committee which dry-cleans radio and television scripts?

by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

III

The Commission's Authorities and Justifications for Its Order Will Not Withstand Analysis, Especially When Placed Against the Mandate of the First Amendment and the Prohibition Contained in 47 U.S.C. § 326.

1. The overwhelming majority of the cases upon which the Commission relies deal with obscene or erotic material or with appeals to prurient interest. See, *e.g., Sonderling Broadcasting Corp.,* 27 Pike & Fisher Rad. Reg. 2nd 285, rehearing denied, 41 F.C.C.2d 777 (1973), affirmed *sub nom. Illinois Citizens Committee v. F.C.C.,* 515 F.2d 397, rehearing denied, 515 F.2d 407 (D.C. Cir. 1975); *Young v. American Mini Theatres* (1976) 427 U.S. 50. The short answer to the attempt to use such cases as authority here is that ". . . it is now well established that obscene material is not protected by the First Amendment." *United States v. 12 200-Ft. Reels,* 413 U.S. 123, 126 (1973), citing *Roth v. United States,* 354 U.S. 476, 485 (1957) and *Miller v. California,* 413 U.S. 15, 23 (1972). But words which are thought by some to be "too strong" or "indecent" have not been banned from the language of discourse. "Fuck the Draft" may be paraded in the courthouse despite its vulgarity and offensiveness to some, and despite the presence of children.

Cases which are concerned with hard core pornography which does not have any serious literary, artistic, political or scientific value are simply not in point. The

Carlin record attacks the very concept that words alone can be indecent. In no sense can it be charged to be utterly without redeeming social value. It is protected speech, and no authority can be found to permit government censorship of it on the ground of taste or alleged "indecency" of words.[6]

2. The Commission argues that because there is a scarcity of spectrum space and because the Commission must license in the public interest, it may "channel" programs based on its standard of "indecency". The argument ignores the premises on which constitutionally valid FCC regulations may be based.

It is of course true that the right of access to the airways requires regulation by the FCC of some of the activities of broadcasters. The owners of radio stations may not escape their obligation to permit the use of the limited airways for the dissemination of views which they do not hold. Consequently the fairness doctrine and the FCC's "right of reply" rules are permissible regulations. The reason is that they are premised on insuring *diversity* of expression over the airways, *not upon censorship* of materials broadcast. In *Red Lion Broadcasting v. FCC* (1969) 395 U.S. 367, 389-390, Justice White stated for the Court:

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[6]A non-obscenity case on which the Commission relies is *Capitol Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.C. 1971), affirmed 405 U.S. 1000 (1973). That case simply does not deal with the problem at hand. It rests upon Congress' supervisory role over the federal regulatory agencies "or as an exercise of its power to regulate interstate commerce." (333 F.Supp. at 584.) Petitioner's speech was held not to be at issue in *Capitol Broadcasting Co.* (*Ibid.*)

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees *in favor of others* whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve *an uninhibited marketplace of ideas* in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (Citations omitted.)

3. The Commission states that it has relied on this Court's recognition that the parental interest in the "upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder* (1972) 406 U.S. 205, 213-214. But that is an emphasis on the parents' rights, not the government's. Further, the Commission's rule assumes that all parents (a) desire that the government regulate for them the content of radio programs, and (b) that all parents would be in favor

of a blanket prohibition of "indecent" material broadcast during daylight hours. These assumptions are unproven, and the order in fact would violate the rights of those parents who would not censor the material available during the day to listeners, including their own children.[7]

The farthest this Court has gone in time, place and manner of speech regulation is in *Young v. American Mini Theaters* (1976) 427 U.S. 50. There, the Court stated that a city's interest in planning and regulating the use of property for commercial purposes permitted restriction on place of exhibition of erotic films and material. That holding, however, does not reach this case, because admittedly, the materials broadcast were not erotic nor was the interest of a community in zoning regulation at issue.

Further, we respectfully submit that the principle set forth in *Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 213, vitiates the Commission's reasoning:

> "[s]peech that is neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."

[7]That the presence of children in the audience should not be determinative, is also shown, we submit, by the fact that no matter the time of a radio broadcast, there may always be children in the audience.

Conclusion.

August Strindberg said in his preface to Miss Julie (1888), "I see the playwright as a lay preacher peddling the ideas of his time in popular form." Both the ideas *and the form* are protected by the First Amendment.

Kingsley Corp. v. Regents of U. of N.Y. (1959) 360 U.S. 684, 688-689;[8]

Cohen v. California (1971) 403 U.S. 15.

The popular form that is peddled is language which is understood and which carries meaning and feeling. Of the words proscribed by the Commission, alternative words which express the same ideas would not be held "indecent". For a writer to say that a man has a bodily function, that he defecates and that he fornicates to procreate clearly cannot be prohibited. That he expresses the same idea in more pungent language does not make the thought or the expression less

[8]In *Kingsley* the Court stated:

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And *in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.*"

protected. That is one of the points attempted to be made by the Carlin monologue.

We return to Mr. Justice Harlan's language in *Cohen v. California* (1971) 403 U.S. 15, 26:

> ". . . much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but *the freedom to speak foolishly and without moderation*.' Baumgartner v. United States, 322 US 665, 673-674, 88 L Ed 1525, 1531, 64 S Ct 1240 (1944).
>
> Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results."

The Order of the Commission should be reversed and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SELVIN and WEINER,
a Professional Corporation,

Attorneys for the Writers Guild of America, West, Inc., Amicus Curiae.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

PACIFICA FOUNDATION,

Respondent.

BRIEF OF AMICUS CURIAE FOR UNITED STATES CATHOLIC CONFERENCE

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent statutory provisions, the provisions of the United States Constitution involved, and the opinions of the court below are set out in the briefs and appendices filed by the appellants. This amicus accepts them for purposes of its own brief. Both parties have consented in writing to the filing of this brief amicus curiae by the United States Catholic Conference.

IDENTIFICATION AND INTEREST OF THE AMICUS CURIAE

A.

IDENTIFICATION OF THE AMICUS

The United States Catholic Conference is a nonprofit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

B.

INTEREST OF AMICUS IN THIS CASE.

Communication as a fundamental human activity touches upon all aspects of human life. The church recognized the import of modern communication. The

Pontifical Commission for the Means of Social Communication has stated:

> 1. The Unity and Advancement of men living in society: these are the chief aims of social communication and of all the means it uses. These means include the press, the cinema, radio and television. The constant improvement in the media puts them at the disposal of more and more people who in their daily lives make increasing use of them. More than ever before, the way men live and think is profoundly affected by the means of communication.
> 2. The Church sees these media as "gifts of God"[1] which, in accordance with his providential design, unite men in brotherhood and so help them to cooperate with his plan for their salvation.
>
> ***
>
> 13. All men of good will, then, are impelled to work together to ensure that the media of communication do in fact contribute to the pursuit of truth and the speeding up of progress. The Christian will find in his faith an added incentive to do this. And the message of the Gospel thus spread will promote this idea — which is the brotherhood of man under the fatherhood of God.[2]

It is the conviction of the amicus that matters of such fundamental import require consideration from all quarters. A spirit of service to the Court prompts this amicus to submit the arguments contained herein for the Court's consideration.

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[1]Encyclical of Pius XII Miranda Prorsus, A.A.S.: XXIV (1957), p. 765.

[2]Communications: A Pastoral on the Media, Public Opinion and Human Progress, USCC, 1971. p. xv and p.4.

SUMMARY OF ARGUMENT

I.

FIRST AMENDMENT DOES NOT REQUIRE GOVERNMENT TO PARTICIPATE IN USE OF INDECENT, PROFANE OR OBSCENE LANGUAGE.

Government is an active participant in the broadcast media. The statutory limitation upon the use of indecent, profane or obscene language which is found in 18 U.S.C. § 1464 is, *inter alia*, a limitation upon government activity. The First Amendment is not a limitation on government to control its own activities.

II.

PROPER ADJUDICATION OF THE INSTANT CASE TURNS ON PUBLIC-INTEREST.

First Amendment rights of broadcast licensee are, we submit, circumscribed by the rights of the public which he serves. There can be no effective resolution of the basic problem confronting the court without a recognition of the pivotal role which the licensee's public must play.

III.

LEGITIMATE PUBLIC INTEREST FURTHERED by 18 U.S.C., SECTION 1464.

Vulgarism, racial and religious slurs are disruptive of the civility which is necessary to the order of society. This kind of offensiveness alienates members of society from each other while adding nothing to the quality of discourse. The public interest manifested by 18 U.S.C. 1464 is an interest in its own order.

IV.

RATIONAL BASIS TEST, RATHER THAN THE TRADITIONAL FIRST AMENDMENT ANALYSIS, IS THE PROPER FRAMEWORK FOR ADJUDICATION.

The proper basis for adjudication of the instant case is whether or not the statute and the action of the regulatory body are reasonably linked for a legitimate public interest.

ARGUMENT

I.

FIRST AMENDMENT DOES NOT REQUIRE GOVERNMENT TO PARTICIPATE IN USE OF INDECENT, PROFANE OR OBSCENE LANGUAGE

Analysis of the instant case in the framework of *Roth*[1] *Miller*[2] and *Paris Adult*[3] is wholly inappropriate. In *Roth, Miller* and *Paris Adult* the court had before it the question of government's authority to restrict "speech" of others. With respect to the broadcast media, however, inquiry shifts from First Amendment limitations on government to the question of whether or not government must accommodate indecent or profane language. Government is an active participant in the broadcast media. It is for this reason, as noted in *Red Lion*[4] that traditional First Amendment analysis does not apply to the broadcast media. It is the position of this amicus that there is nothing in the First Amendment's restrictions upon government which requires that government itself participate in the activity complained of here. It is one thing to say the government must refrain from prohibiting certain kinds of speech. It is another to say that government must itself participate in such speech.

It is the contention of this amicus that the First Amendment would not be a bar to a federal statute which prohibited

[1] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

[2] *Miller* v. *California*, 4133 U.S. 15 (1973).

[3] *Paris Adult Theater* v. *Slaton*, 413 U.S. 49 (1973).

[4] *Red Lion, Inc. et al* v. *FCC, et al.*, 395 U.S. 367 (1968).

the government making soft-core pornographic films acceptable to local community standards. The First Amendment is a limitation on government's power to control citizens. It is not a limitation on government's right to control its own activities. Statutory limitations on indecent, profane and obscene language in the broadcast media are, inter alia, a limitation upon government. It forbids the government to lend its support to such activity. The constitutional touchstone here is, we submit, found in the resolution of the question of whether or not there is a legitimate public interest which is reasonably served by such a statute.

II.

PROPER ADJUDICATION OF THE INSTANT CASE TURNS ON PUBLIC INTEREST

Thee is an unfortunate likelihood that the instant action may be perceived to involve only two parties, namely, the FCC and the licensee, Pacifica Foundation. There is, of course, a third party whose interest, as we shall discuss below, conditions the rights and responsibilities of both the named parties in the instant action. We speak, of course, of the public, in whose interest licensee is to carry forward his use of the media and for whose benefit the government is to carry forward its regulation.

There is a tendency to assume that "government" is coterminus with the public. Both the commercial licensee and the government are very often found to speak of the "public interest". Nevertheless, it is clear that neither of these two can claim the right to speak for the public.

We are of the opinion that the decision below is fundamentally flawed because the court below failed to recognize that the dispute involves not merely the two named defendants but a third party whose rights are, in the last analysis, more significant than either of the two named parties. The conflict which bottoms this dispute is in reality a conflict about the nature of a tripartite relationship between the public, government and the licensee. The previous decisions of this court relating to the broadcast media have clearly recognized the importance of this tripartite relationship.

The nature of the broadcast media and the history of their growth, which were carefully examined in *Red Lion, Inc., et al* v. *Federal Communications Commission, et al*[5] (395 U.S. 367) have given rise to a complex set of questions which must inevitably be resolved. Some of the principal questions are: (1) whether or not there should be standards relating to program content, (2) who should establish such standards, and (3) how such standards should be implemented. The factual pattern of the instant case is, we submit, a product of the various tensions surrounding these questions.

It is the unique quality of the broadcast media to operate on two opposing concepts: the principle of public trusteeship and the principle of journalistic discretion. It is no accident that the two principal Supreme Court decisions in this area — *Red Lion*[6] and *CBS*[7] — spring from the tensions created by this antinomy. The history of litigation in this area is a

[5]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968).

[6]See Note 5.

[7]CBS v. Democratic National Committee, 412 U.S. 94 (1972), p. 118.

record of attempts by the various parties to denigrate one or the other of these principles.

Licensees have argued that their discretion is absolute under the First Amendment and have chafed under trusteeship-rooted fairness regulations. Were broadcasters to succeed in winning full acceptance of their point of view, the antinomy would be broken since the trusteeship concept would hold no meaning in law.[8]

Those asserting the trusteeship principle have argued that they are entitled to access to the media. If they were to succeed, the antinomy would similarly be broken, since the "public" would have supplanted the licensee.[9]

In the instant case we are faced with such tensions. On the one hand, the FCC acting under statutory recognition of the trusteeship principle has sought to enforce standards of content. On the other hand, the licensee seeks to expand his role to the complete exclusion of both other parties — government and public.

The trusteeship concept has not yet been thoroughly developed, and it is the position of this amicus that many fundamental difficulties in this area flow from an incomplete analysis of this concept. Historically, there is the common notion that trusteeship merely means access. the history of the ascertainment policy which originated in 1960 indicates that a large percentage of content-related complaints seek redress by access.[10]

Another facet of the trusteeship concept which has received attention is the notion that government regulation of

[8]Red Lion Broadcasting, Co., *supra*.

[9]Columbia Broadcasting System, *supra*.

[10]Canby, 55 Texas Law Review 67 (1976).

media be socially responsive in calculating public needs. One need only look to the ascertainment policy to certify acceptance of the concept that government is the medium for expression of public will.[11]

The First Amendment rights of the broadcast licensee are, we submit, circumscribed by the rights of the public which he serves. There can be no effective resolution of the basic problem confronting the Court without a recognition of the pivotal role which the licensee's public must play.

Mr. Justice White, writing in *Red Lion Broadcasting, supra,*[12] said the media system must ultimately serve the viewers and listeners, whose rights were deemed to be paramount.[13] The Court characterized licensees as "given the privilege of using scarce radio frequencies as proxies for the entire community."[14]

> "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of press."

Chief Justice Burger, writing for the Supreme Court in

[11] *Ibid.*

[12] Red Lion, *supra.*

[13] *Ibid,* page 390.

[14] *Ibid,* page 394.

Columbia Broadcasting System, Inc. v. *Democratic National Committee,* states:

> "A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee'."[15]

Thus, it is a well-established principle that broadcast licenses serve as "proxies" for the community. The relationship of the broadcast licensee to the public which he serves is, we believe, the proper focal point for resolving the complex and vexatious questions noted above regarding program content.

Moreover, the court has recognized that the existence of this tripartite relationship removed the broadcast media from the traditional First Amendment analysis. The broadcast media is uniquely a creature of this tripartite relationship and as a practical matter can have no existence outside this relationship. In recognition of this fact this court has repeatedly held that whatever First Amendment rights a licensee may possess are circumscribed by the public interest. *Red Lion* v. *FCC,* 395 U.S. 367 (1968).

It is the position of this amicus that the rights of broadcast licensees with respect to program content are at some point circumscribed by rights which the public retains. In our view, a proper development of the trusteeship concept would include, inter alia, *direct public involvement in broadcaster practice.* Such involvement could be implemented through means not yet fully explored; for instance, establishment of regional and/or local broadcasting councils or even through referendum or election of licensees. We do not advance any of these alternatives as necessarily the proper method to

[15] CBS v. Democratic National Committee, *supra.*

implement the public's role in broadcasting; however, we do respectfully urge the Court to take care to avoid an adjudication of the present dispute which might foreclose development of substantive aspects of the trusteeship concept.

Admittedly, there has been little substantive development of the trusteeship concept. Nevertheless, it is our view that the doctrine of public trusteeship, unless this concept is merely a useful fiction, inevitably implicates a penumbral right of the licensee's public to circumscribe the broadcaster's discretion regarding program content.

Thus, the questions before this Court are (1) whether the public has a legitimate interest which needs to be protected in the repression of "indecent, profane or obscene language" and (2) whether the government's actions are reasonably calculated to protect those interests.

One must not forget that the First Amendment is a limitation upon government. We recognize that there is a tendency for government to take upon itself the mantle of the public and this must be resisted. This very reason is why the court has seen fit to recognize that a licensee of the broadcast media does have certain First Amendment rights. But the controlling factor here is not the rights of licensee nor the rights of the government, but rather public interest. This litigation and litigation involving similar matters, *Writers Guild of America* v. *FCC*, 423 F. Supp. 1064 (1976), can only be properly understood in terms of a process to resolve the nature of this tripartite relationship.

III.

LEGITIMATE PUBLIC INTEREST FURTHERED BY 18 USC, SECTION 1464

Just as it is a misperception to view the instant dispute as involving only the government and licensee, it is also a misperception to view the instant controversy as between the public and "seven words". The disassociation of the words from their societal context puts before the Court a conflict which does not, in fact, exist. Language is never disassociated from human conduct for language is uniquely a human attribute. While it is possible to disassociate language from human affairs in an abstract sense it is not possible to do so in a legal context. This is particularly so in the framework of our constitutional system.

Article III requires that federal jurisdiction can only be invoked when there is a "case or controversy". The myriad of court decisions which have dealt with the standing issue reflect a genuine concern that adjudication take place only in a "concrete context". *Warth* v. *Seldin*, 422 U.S. 490, 498-502; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-39 (1976).

It is for this reason that we call the Court's attention to the fact that the instant dispute does not involve the public interest in the seven words. Rather, the case deals with the public's right to repress vulgarity. Mr. Carlin suggests that one is not permitted to say these seven words on the air and the implication of his remarks is that this is so because of statutory restrictions. This amicus submits that there are other reasons involved and that those lie in the public's right to protect itself.

The relationship of law to both public and private activity is twofold — it regulates and it teaches. It has a coercive and a didactic function. In truth, the didactic element is probably the more important even in the regulatory process. Law always does more than simply regulate activity; law does more than described herein. Law articulates the values to which we, as a society, subscribe. In the area of public activity, it is widely recognized that the notion of appropriateness comes into play. The word "indecent" means "inappropriate". Most vulgarity falls into this category. When we speak of inappropriate public conduct or speech we look not only to the speaker or to the text but to the listener as well.

This Court has repeatedly recognized that words can and do have an assaultive impact. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). As the late Alexander M. Bickel stated:

> "Even speech which advocates no idea can have its consequences. It may inflict injury by its very utterance, as the Court said a generation ago, in the Chaplinsky case, of lewd or profane or fighting words. There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated."[16]

The monologue at issue in the instant case is not only vulgar but is calculatedly so. Mr. Carlin started out with the premise of choosing language for its offensiveness. We choose not to use certain words in public out of consideration for the impact that they have on other members of society who find these words offensive.

[16]Bickel, the Morality of Consent, (1975) p. 72.

Contrary to what Mr. Carlin suggests, it is not the words which are of concern, but the societal context in which the "speech" takes place. Vulgarisms, racial epithets and religious slurs are destructive of the civility which is necessary to the order of society. This kind of offensiveness alienates members of society from each other while adding nothing to the quality of discourse. The public interest manifested by 18 USC §1464 is, then, an interest in its own order. The legitimacy of legislative action to protect this interest has long been recognized.

> "In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect '*the social interest in order and morality.*' *Roth* v. *United States,* 354 U.S. at 485, 77 S. Ct., at 1309, quoting *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1952) (emphasis added in Roth).[17]

In short, society pays a very real price for such vulgarisms and gains nothing in return. Moreover, as this Court has noted:

> "There are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard* v. *Alexandria,* 341 U.S. 622, 642, 71 S. Ct. 920, 932, 95 L. Ed. 1233 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself."[18]

[17]Paris Adult v. Slaton, *supra.*

* * *

". . . The question is, should there be a right to obtain obscene books and pictures in the market, or to foregather in public places — discreet but accessible to all — with others who share a taste for the obscene? To grant this right is to affect the world about the rest of us, and to impinge on other privacies and other interests, as those concerned with the theater in New York have found, apparently to their surprise. Perhaps each of us can, if he wishes, effectively avert the eye and stop the ear. Still, what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment."[18]

The value manifested by 18 U.S. Code, Section 1464 is, at bottom, that of commitment to civility. It is the contention of this amicus that the statutory prohibition contained in this section reflects a legitimate public interest in the limitation of the government's participation in such activity.

IV.

RATIONAL BASIS TEST, RATHER THAN THE TRADITIONAL FIRST AMENDMENT ANALYSIS, IS THE PROPER FRAMEWORK FOR ADJUDICATION.

It is the view of this amicus that with respect to the statutory regulation of the broadcast media, the proper standard of review is a rational basis test. It is clear from the Court's previous ruling with respect to the broadcast media that traditional First Amendment analysis is not applicable

[18]Bickel, *supra*, p. 74.

to the broadcast media. *Red Lion* v. *FCC, supra,* and *CBS* v. *Democratic National Committee, supra.* Further, we submit that the proper basis for adjudication in the instant case is whether or not the statute *and* the action of the regulatory body are reasonably linked to a legitimate public interest.

The prohibitions contained in 18 USC § 1464 are, as we have noted above, closely related to legitimate public interest. This Court's rulings in *Roth,*[19] *Miller*[20] and *Paris Adult*[21] have in fact found legitimate public interest in order and morality. Moreover, we would submit than the statutory language in question is sufficiently drawn to provide adequate notice to those who might be prosecuted under it. No more lucid demonstration of this fact is needed that the fact that Mr. Carlin himself recognized that broadcast was not permissible. In plain fact, the entire monologue was designed to be calculatedly offensive and to do the very thing which he recognized to be improper.

V.

CONCLUSION

The broadcast media are by their nature a unique creature of a tripartite relationship involving the public, government and the licensee. The tensions which surround the media flow from a failure to fully develop a trusteeship concept in its substantive dimensions. Nevertheless, it is clear that government itself is an active participant in the broadcast media

[19]Board of Regents v. Roth, *supra.*

[20]Miller v. California, *supra* 18.

[21]Paris Adult v. Slaton, *supra.*

and a statutory rather than constitutional framework is the proper basis for adjudication of the relationship between these parties. It is clear that the public interest is paramount. Proper adjudication of the dispute must be grounded in a determination of whether or not the government's action furthers a legitimate public interest.

This Court has long recognized a legitimate public interest in the integrity of the social order. In light of this interest, we submit that the statute in question and the regulatory activity undertaken in compliance with that statute are reasonably calculated to advance this public interest. For that reason the amicus respectfully urges the Court to reverse the lower court decision and to reaffirm the validity of the statutory prohibition against the use of indecent, profane or obscene language in the broadcast media.

Respectfully submitted,

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FOR ARGUMENT

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

PACIFICA FOUNDATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation

Twentieth Century-Fox Film Corporation
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

All of MPAA's members engage in the production and/or distribution of motion pictures designed for initial exhibition in theatres. These films are subsequently exhibited on pay television, network television, and local television stations. In addition, some of MPAA's members also engage in the production of motion pictures, series and other material designed for initial exhibition on television.

Disposition of the instant case will vitally affect the interests of MPAA's members insofar as it articulates the relevant constitutional considerations governing the control of material disseminated by means of one or more of the various "electronic media." It will also vitally affect the interests of MPAA's members insofar as it influences the content of any future legislation in this area.

MPAA has requested and has received permission from counsel of record for both parties to file this Brief *amicus curiae*.[1]

MPAA believes that the FCC exceeded its jurisdiction by taking the action which is at issue in this case (Point I, *infra*) and, more importantly, that any evaluation by this Court of the underlying constitutional considerations in this area should carefully differentiate between the various "electronic media," particularly radio and pay television (Point II, *infra*).

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[1] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

ARGUMENT

I.

The Federal Communications Commission exceeded its jurisdiction in adopting the Declaratory Order at issue in this case, and the judgment of the Court of Appeals should therefore be affirmed on statutory grounds.

This case presents for consideration by the Court yet another situation "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208 (1975).

At issue here is the validity of an FCC *Declaratory Order* which characterizes as "indecent" the broadcast of:

> "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." (App. 15; footnote omitted.)

The Commission issued its *Declaratory Order* in response to the mid-afternoon broadcast by WBAI-FM (New York) of a recorded monologue by comedian George Carlin dealing with uses of and reactions to certain "four-letter words." The FCC employed the WBAI-FM broadcast as the basis for indicating how it would in the future interpret and apply the term "indecent" in the Federal criminal statute prohibiting the broadcast of "any obscene, indecent, or profane language" (18 U.S.C. §1464). The Commission did not contend that the language in question was "ob-

scene," either *per se* or for children alone, and the FCC has clearly indicated that it has no intention of enforcing the statutory term "profane." [2]

The *Declaratory Order* argued that the Commission could prohibit the broadcast of certain non-obscene but nevertheless "indecent" speech on the ground that radio is a uniquely "intrusive" medium whose audience it is difficult, if not impossible, to monitor or shield. (The FCC has elsewhere described its rationale as embodying "the captive audience notion." [3]) The Commission placed special emphasis on the fact that radio broadcasts reach unsupervised children,[4] and also indicated concern that they invade the privacy of the home and reach unwitting adults as well.

Upon petition for review by Pacifica Foundation, the owner of WBAI-FM, a divided Court of Appeals reversed the Commission by a vote of 2-1. *Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (D.C.Cir. 1977) (App. 45). Judge Tamm thought that the *Declaratory Order* violated Section 326 of the Communications Act of 1934 (47 U.S.C. §326). Chief Judge Bazelon thought that the Commission's action violated the First Amendment. Judge Leventhal, in dis-

[2] *FCC Obscenity-Indecency Legislative Recommendations*, 122 Cong.Rec. S17101 et seq. (September 29, 1976), at pages S17106-S17107.

[3] *Id.* at S17106.

[4] As indicated in the preceding textual paragraph, we do not understand the Commission to contend that the language which the *Declaratory Order* defines as "indecent" is obscene for children. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Rather, we understand the Commission to contend that, in a "captive audience" situation, children are less able (or willing) to seek escape than adults would be. Although the *Declaratory Order* did not define the term "children," the FCC has subsequently indicated that it means those under the age of 12. *FCC Obscenity-Indecency Legislative Recommendations, supra*, at S17106.

sent, indicated some reservations about the precise terms of the *Declaratory Order* but would have upheld it at least as applied to WBAI-FM's broadcast of the Carlin monologue.

In its most far-reaching sense, the *Declaratory Order* raises what Judge Tamm described as "the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected" (App. 46). We do not think it is either necessary or desirable for this Court to decide that question here, for we believe that the *Declaratory Order* exceeds the Commission's jurisdiction in any case.

We do not doubt the seriousness of the Commission's concerns or the sincerity of its efforts to cope with what is clearly an "intractable" [5] problem. Nor do we doubt that WBAI-FM's deliberate mid-afternoon broadcast "of words which are undeniably regarded as offensive by many people" [6] displays, at best, a certain lack of circumspection. However, no matter how laudable the Commission's objectives (or, conversely, no matter how imprudent Pacifica's conduct), the FCC simply lacks the authority to do what it did in this case.

Certainly, affixing the statutory label "indecent" to the substantive standard enunciated in the *Declaratory Order* does not suffice to bring the Commission's action within its jurisdiction. The label alone is not controlling. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957).

As the Eighth Circuit recently observed in striking down certain FCC rules the adoption of which were found to ex-

[5] *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 704 (1968) (opinion of Harlan, J.).

[6] Brief for Pacifica Foundation in the Court of Appeals, page 5.

ceed the Commission's jurisdiction, "governmental agencies are limited to the exercise of power delegated by the Congress. . . ." *Midwest Video Corporation* v. *F.C.C.*, —— F.2d ——, 3 Med.L.Rep. 1817, 1828 (8th Cir. 1978). Here, the most Congress has delegated to the FCC is concurrent authority to enforce the standards set forth in 18 U.S.C. §1464. It has *not* empowered the FCC to legislate altogether new and different prohibitions in the guise of "clarify[ing] the applicable standards" (App. 17). Of course, "[w]henever the law draws a line there will be cases very near each other on opposite sides," *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930), but there are several reasons which compel the conclusion that the *Declaratory Order* steps well over the FCC's jurisdictional line.

First, the FCC and the Department of Justice have concurrent power to enforce Section 1464. Yet there is nothing in the Record which even remotely indicates that the Department has approved, acquiesced in or will follow the Commission's interpretation of the statutory term "indecent." Indeed, the most recent case indicates that the Department will be compelled to adhere to a more narrow standard in any Section 1464 prosecutions instituted by it. *United States* v. *Simpson*, 561 F.2d 63 (7th Cir. 1977).[7] As this Court held in a strikingly analogous situation more than two decades ago, "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

[7] There are very few reported decisions under Section 1464. In addition to *Simpson*, see *United States* v. *Smith*, 467 F.2d 1126 (7th Cir. 1972); *Tallman* v. *United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966). See also: *Duncan* v. *United States*, 48 F.2d 128 (9th Cir. 1931), *cert. denied*, 283 U.S. 863 (1931).

Second, the statutory term "indecent" has long since been drained of any independent validity as a standard in this area. See, e.g., *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973); *Roth* v. *United States*, 354 U.S. 476 (1957). The Commission nevertheless argues that presence of the word "indecent" in Section 1464 authorizes it to develop and apply altogether new substantive standards in a variety of discrete factual contexts. In this proceeding, the FCC proscribed the broadcast of certain language "at times of the day when there is a reasonable risk that children may be in the audience" (App. 15). At the same time, however, the Commission said that its proscription did not apply to live news broadcasts containing the same language (App. 43 n. 1) and that it might not apply to broadcasts "during the late evening hours" (App. 15). In another proceeding, the FCC has ruled that the term "indecent" could not be extended to encompass televised portrayals of violence. *Polite Society, Inc.*, 55 F.C.C.2d 810 (1975). And in its Brief before this Court, the Commission describes the *Declaratory Order* as *"ad hoc"* and indicates that the standards announced therein might be "applied, modified or extended" under "a different set of facts."[8]

The Commission claims to be doing all of this in order to "clarify the applicable standards" (App. 17). But what the FCC is doing isn't the clarification of existing standards; it is the legislation of altogether new standards.

In the face of more than two decades of decisions invalidating use of the statutory term "indecent" as an independent standard in this area, and in the absence of any affirmative Congressional action in response thereto, the Commission's assertion of power certainly demands a clear and unmistakable expression of legislative intent.

[8] Brief for Petitioner FCC, pages 42-43.

None is to be found. Compare *F.C.C.* v. *American Broadcasting Co., supra; Regents* v. *Carroll,* 338 U.S. 586 (1950); *Midwest Video Corporation* v. *F.C.C., supra.* See also: *Peters* v. *Hobby,* 349 U.S. 331 (1955).

Third, Section 1464 is a penal statute, and must therefore be "construed strictly." *F.C.C.* v. *American Broadcasting Co., supra,* at 296. There is no question, however, that the FCC's interpretation of "indecent" in this proceeding is expansive. Compare *Rabe* v. *Washington,* 405 U.S. 313 (1972) (per curiam). It not only lacks support in the decided cases,[9] but also lacks support in the "regulatory caselaw" [10] which the Commission cites in support of itself. The FCC's construction of "indecent" in previous proceedings involving WUHY-FM (1970)[11] and WGLD-FM (1973)[12] was much narrower than it is here. Those proceedings defined "indecent" as language which was patently offensive and utterly without redeeming social value.

Fourth, the *Declaratory Order* directly prohibits the use of constitutionally protected speech during portions of the broadcast day. At a minimum, the First Amendment requires a clear and firm jurisdictional base before an administrative agency may engage in regulation of the type which the Commission has undertaken here. *Home Box Office, Inc.* v. *F.C.C.,* 567 F.2d 9 (D.C.Cir. 1977), *cert. denied,* 46 U.S.L.W. 3216 (October 3, 1977). In this case there is absolutely no indication that Congress intended to confer such jurisdiction upon the FCC.

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[9] See footnote 7, *supra,* and accompanying text.

[10] Brief for Petitioner FCC, page 14.

[11] *Eastern Educational Radio,* 24 F.C.C.2d 408 (1970).

[12] *Sonderling Broadcasting Corp.,* 27 R.R.2d 285 (1973), *reconsideration denied,* 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Committee for Broadcasting* v. *F.C.C.,* 515 F.2d 397 (D.C. Cir. 1974), *rehearing en banc denied,* 515 F.2d 407 (D.C.Cir. 1975).

In short, the Commission's purposes in issuing the *Declaratory Order* were obviously well-intentioned, but its jurisdiction is not thereby rendered open-ended. No matter how serious the problem confronting the FCC in this area, "administrative expansion of [Section 1464] does not provide the remedy." *F.C.C.* v. *American Broadcasting Co., supra,* at 297 (footnote omitted). Adoption of the *Declaratory Order* clearly exceeded the Commission's authority, and the judgment of the Court of Appeals should therefore be affirmed on statutory grounds.

II.

Any evaluation by this Court of the underlying constitutional considerations in this area should carefully differentiate between the various "electronic media."

This case involves radio. It does *not* involve television, cable television, pay television or any one of the various new electronic technologies which are now emerging (videodiscs, pre-recorded videotapes, cable systems with two-way communications capability, etc.).

Nevertheless, the Commission is now employing the rationale of the *Declaratory Order* and the substantive standards enunciated therein as the basis for legislative proposals which apply "to *all* electronic media." *FCC Obscenity-Indecency Legislative Recommendations,* 122 Cong.Rec. S17101 et seq. (September 29, 1976), at page S17109 n. 97 (emphasis added).

We have indicated above (Point I, *supra*) that we do not believe it is either necessary or desirable for this Court to reach the underlying constitutional considerations in this area in order to decide the instant case. This is a nascent

field of law, and any constitutional ruling at this point would seem premature. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). However, to the extent that this Court's decision involves *any* evaluation of the applicable constitutional standards, we believe it is essential to distinguish between what several recent opinions have referred to without differentiation as the "broadcast media," [13] the "electronic media," [14] and the "electronic broadcast media." [15]

Obscenity, either *per se* or for children alone, is not an issue here. We do not contest the power of the FCC, with appropriate legislative authorization,[16] to proscribe the dissemination by "electronc media" of material which is obscene *per se*. *Miller* v. *California*, 413 U.S. 15 (1973). Nor does this case raise the constitutional problems which would be presented by an FCC attempt to proscribe the dissemination by electronic media of material which is obscene for children alone. See *Erznoznik* v. *City of Jacksonville*, *supra*, at 212-214; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Butler* v. *Michigan*, 352 U.S. 380 (1957).

Rather, what is at issue here is the constitutional propriety of the FCC's attempt to prohibit the dissemination

[13] *Buckley* v. *Valeo*, 424 U.S. 1, 49-50 n. 55 (1976) (per curiam).

[14] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, at 99; *Carey* v. *Population Services International*, 431 U.S. 678, 712 n. 6 (1977) (opinion of Powell, J.).

[15] *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895, 4904 (June 27, 1977).

[16] Section 1464 refers to obscene "language." The Commission's legislative proposals would apply to both obscene language and obscene visual portrayals. *FCC Obscenity-Indecency Legislative Recommendations*, *supra*, at S17102. The FCC's proposed definition of "obscene material," *id.* at S17101, raises certain questions, but we do not think it is necessary to comment upon these here.

by electronic media of material which is "offensive" without being obscene. The FCC calls such material "indecent," but its label is beside the point.

The FCC's position with respect to "indecent" material evolved in a series of four Commission cases—WUHY-FM (1970),[17] WGLD-FM (1973),[18] WBAI-FM (1975),[19] and WXPN-FM (1975)[20]—all of which involved radio and all of which "relied crucially upon the differences between radio and other media. . . ." [21] The rationale underlying all of these cases was that radio is a uniquely "intrusive" medium whose audience it is difficult, if not impossible, to monitor or shield.

The dissemination of non-obscene but nevertheless "offensive" material by means of radio may well require "resourceful efforts to cushion rather than resolve clashes between the First Amendment and interests conflicting with it." Bickel, *The Morality of Consent* 78 (1975). See also: *Kovacs* v. *Cooper*, 336 U.S. 77, 81 (1949); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908).

However, the FCC no longer limits its intrusiveness rationale to radio and now seeks to have it applied to *all* "electronic media." *FCC Obscenity-Indecency Legislative Recommendations*, *supra*, at S17101, S17105-S17106. Its legislative proposals would prohibit equally the dissemination of "indecent" as well as "obscene" material by elec-

[17] *Eastern Educational Radio*, *supra*, footnote 11.

[18] *Sonderling Broadcasting Corp.*, *supra*, footnote 12.

[19] *Pacifica Foundation*, 56 F.C.C.2d 94 (1975), *clarified*, 59 F.C.C.2d 892 (1976), *rev'd sub nom. Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (D.C.Cir. 1977), *cert. granted*, 46 U.S.L.W. 3436 (January 9, 1978).

[20] *Trustees of the University of Pennsylvania*, 57 F.C.C.2d 782 (1975).

[21] Brief for Petitioner FCC, page 11.

tronic media as disparate as radio and pay television."[22] And the Commission's proposed definition of "indecent" is derived directly from the *Declaratory Order* in this case. *Id.* at S17109 n. 118.

Accordingly, *any* evaluation by this Court of the underlying constitutional considerations in this area will impact directly upon the future course of the FCC's legislative proposals. Our primary concern is with pay television, a relatively new medium which provides to its subscribers a variety of programming services, including unedited and uninterrupted motion pictures produced for initial exhibition in theatres. Pay television programming is exhibited on a special channel, which may be viewed *only* by those who subscribe to and pay for it.[23] See, generally, *Home Box Office, Inc.* v. *F.C.C., supra.*

The motion pictures exhibited on pay television are not obscene, but some of them might be considered "indecent" under the FCC's definition of that term. Because we believe the First Amendment raises an insuperable obstacle to application of the FCC's indecency concept to non-obscene material exhibited on pay television, we have outlined below some of the constitutional considerations which differentiate pay television from radio.

[22] The FCC's proposed legislation, *id.* at S17101, and the explanation which accompanied it, *id.* at S17109 n. 104, S17109-S17110 n. 121, contemplate certain affirmative defenses to a charge that "indecent" material was disseminated by means of electronic media. However, we are here concerned with matters of constitutional right, not statutory grant.

[23] Pay television programming is currently distributed by means of cable, scrambled over-the-air signals, and multi-point distribution systems. In this context, the mode of distribution is of no constitutional significance since in all modes pay television programming is available only to those who subscribe to it.

As of December 31, 1977, a total of 1,733,611 U.S. households subscribed to pay television. *The Pay TV Newsletter,* March 8, 1978, page 1.

First, the constitutional ability of the FCC to prohibit the dissemination of non-obscene but nevertheless "indecent" material by means of "electronic media" is wholly dependent upon "the captive audience notion."[24] Each electronic medium, however, "tends to present its own peculiar problems." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503 (1952). At one extreme is radio, a ubiquitous and omnipresent medium to which everyone has uncontrolled and uncontrollable access. It is found not only in homes, but also in automobiles and restaurants and on sidewalks and beaches. And all of radio's numerous stations are available simply by turning the dial, or may be heard simply by being within earshot of someone who turns the dial. The potential of radio for making "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," *Redrup* v. *New York,* 386 U.S. 767, 769 (1967) (per curiam), is therefore not insubstantial. At the other extreme is pay television, a medium whose locations are limited (usually to the home) and whose reception requires constitutionally significant choice and affirmative action on the part of its subscribers. Electing to receive pay television programming is therefore analogous to purchasing a ticket of admission to a motion picture theatre.

Second, when an individual buys a radio, he is merely purchasing a piece of equipment. All of the programming broadcast thereon comes with it, whether he likes it or not and whether he finds it "offensive" or not. When an individual subscribes to pay television, however, he is purchasing a discrete programming service, knowing in advance that one of its features is unedited theatrical motion pic-

[24] *FCC Obscenity-Indecency Legislative Recommendations, supra,* at S17106.

tures. Thus, subscribing to pay television represents a deliberate, wholly volitional decision to obtain certain kinds of programming, and no privacy rights are invaded by the exhibition of non-obscene motion pictures which might be considered "indecent" by the FCC.

Third, anyone of any age, including unsupervised children, can purchase and possess a radio. By contrast, subscribing to pay television requires dealings with the company providing such service, installation of special equipment, and the payment of monthly bills—all in the context of the home. These functions will be performed by or with the authorization of parents, not children. Thus, to the extent that children are exposed to pay television programming, their parents have made a deliberate, knowing choice to have such material available in the home. See *Ginsberg* v. *New York, supra,* at 639; *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

In sum, whatever the merits or demerits of the Commission's position with respect to radio, pay television presents altogether different constitutional and common sense considerations. Any evaluation by this Court of the applicable constitutional standards in this area should therefore carefully differentiate between the various "electronic media."

CONCLUSION

For the reasons set forth above, the judgment of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed.

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FOR ARGUMENT

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(Submitted upon Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the Authors League

The Authors League is the national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving freedom of expression, and it has therefore filed briefs *amicus curiae* in several appeals heard by the Court. The Authors League believes that the declaratory order of the Federal Communications Commission is an unconstitutional restraint on freedom of expression in radio broadcasting. Consequently, the League—with the consent

of the parties—submits this brief *amicus curiae* urging the Court to affirm the judgment of the Court of Appeals reversing the Commission's order.

ARGUMENT

The Commission's ban on "indecent" words violates the First Amendment.

1. The Authors League believes that the Commission's order was an act of censorship barred by 47 U.S.C. Sec. 326 for the reasons stated by Judge Tamm, and that it violated the First Amendment for the reasons stated by Chief Judge Bazelon. As he noted, prohibiting broadcasts containing the seven words until early morning effectively bans them for most adults.

2. The order, if reinstated, would impose a significant restraint on freedom of expression of non-commercial radio stations that furnish much of the serious programming in this medium. The ban on the seven itemized words, or on other "words such as" the indecent seven, would prevent stations from broadcasting readings from books, essays and poetry by many eminent writers—works that employ these words in depictions of sex that are not obscene, or use the words in non-sexual contexts, or use them to denote many of their non-sexual meanings. Some of these authors are listed in Judge Tamm's opinion, in footnote 17.

The Commission would substitute an unconstitutional censorship order for the editorial judgment of non-commercial stations in determining when readings from such books and other material should be broadcast. For the reasons discussed below, this preemption of editorial responsibility cannot be justified on theories that radio is an irresistable "thrusting" medium or that a broadcast

containing the words is a deadly menace to children. And neither theory justifies the order's violation of the First Amendment.

3. The Authors League submits that the order's purpose and illogical consequences are impossible to reconcile with the First Amendment.

(i) The Commission did not contend that Mr. Carlin's monologue was obscene. Clearly it was not. However, the Commission concluded that the banned words "depict" sexual and excretory activities in a manner offensive for the broadcast media. But the words, standing alone, do not "depict" these activities in the dictionary or the First Amendment sense. They do not *describe* ultimate sexual or excretory acts—as would a scene in a television drama or an episode narrated in a novel. Each word simply denotes an act. And Mr. Carlin did not use the words as part of a description of ultimate sexual acts, but rather in a discussion of our attitudes and reactions to the seven words, and their multiplicity of meanings—many of which are *not* sexual and not excretory.

Actually, the Commission's order was a "matter of conditioning and etiquette." And the First Amendment should not have to give way to etiquette. The eminent lexicographer Stuart Berg Flexner notes:

> "There is, of course, no logical reason why *fuck, screw, make* (1922), or any other term (see OH SHIT!) should be 'dirty', shocking, or taboo, no logical reason why they should be considered any different than such synonyms as *copulate, sexual intercourse* or *feces.* It's a matter of conditioning and etiquette." (I HEAR AMERICA TALKING; p. 157. Van Nostrand Reinhold. New York, 1976)

Referring to Mr. Flexner's preface to the DICTIONARY OF AMERICAN SLANG, Theodore M. Bernstein says:

> "The reason for the frequent use of such words, as he points out, is undoubtedly that 'slang words for sexual attractions and for a variety of sexual acts, positions and relationships are more common than standard words,' which are scarce or remote and scientific. There is not, for example, a single transitive verb in respectable or even in scientific language that expresses the idea of the slang word *fuck*. As to other bodily functions, a somewhat similar situation prevails. There are no words for *shit* and *piss* aside from the correct but stilted verbs *defecate* and *urinate*." (SLANG AND ITS ANALOGUES, J.S. Farmer and W.E. Henly, 1890-1904; Reprint 1970, Arno Press; New York. Introduction, at p. 1)

The Commission's order would have barred WBAI from broadcasting these comments by Mr. Flexner and Mr. Bernstein, since they contained three of the seven forbidden words. It is not clear whether the Commission's ban was limited to the seven words, or whether it also applied to synonyms. In either event, the consequences cannot be reconciled with the First Amendment.

(ii) If the Commission's order is limited to the seven words, then radio stations could broadcast works containing synonyms for them. Each of the words has a rich variety of synonyms; some also considered "vulgar", others having a double meaning: words that convey a conventional meaning and also denote a sexual act. Mr. Flexner discusses some of the synonyms for "fuck" that carry the same taboo (op. cit., p. 157). And there are many double-entrendre synonyms: e.g. "make" and "bang". (THE AMERICAN HERITAGE DICTIONARY OF THE AMERICAN LANGUAGE,

American Heritage Publishing Co., Inc. and Houghton Mifflin Company; 1969).

If the order is limited to the seven words, then it would not apply to a similar monologue/essay that uses "fellatrice" instead of "cocksucker" (DICTIONARY OF AMERICAN SLANG, Wenthworth and Flexner; Thomas Y. Crowell, New York. 1975); or employs a pointed Oedipus/Jocasta word symbol for "motherfucker"; or substitutes for "cunt" any one of an enormous array of synonyms—some carrying the same taboo, others of the double-entendre variety. (See pages 336, 337, 338, 339, 340; SLANG AND ITS ANALOGUES; pages 341, 342, 343, 344, 345 for foreign synonyms.)

If the order is limited to the seven words, then a non-commercial radio station could broadcast a passage which used an acronym (e.g. SNAFU) or initials (e.g. F.O., or F.T.A., or G.F.U.) for one of the forbidden words (I HEAR AMERICA TALKING, pages 158-159); or a foreign synonym such as "merde" or "emmanche" (DICTIONARY OF FRENCH AND AMERICAN SLANG, Leitner and Lanen; Crown Publishers, Inc., New York; 1965); or read it with a quasi-ellipsis: for example "f—dot—dot—k".

Thus, if the order permits the broadcasting of many other words that denote the same sexual acts as the forbidden seven, and equally affront the sensitive in WBAI's audience—the Commission's rationalization for the order collapses. Moreover, the order prohibits the broadcast of the seven in their many non-sexual contexts. The word "fuck" has many meanings other than sexual intercourse (see, e.g. THE AMERICAN HERITAGE DICTIONARY; I HEAR AMERICA TALKING, pp. 158-159); and each of the other six words also have several non-sexual and non-excretory meanings. Many examples are discussed in the authorities we have cited. (See also A DICTIONARY OF SLANG AND UN-

CONVENTIONAL USAGE, Eric Partridge; 7th Ed. MACMILLAN PUBLISHING CO. INC., N.Y.)

(iii) If the Commission intends the order to apply to synonyms, to other "words such as" the indecent seven, this greatly increases its intrusion on the First Amendment. Broadcasts of readings from a vast catalog of valuable literary and dramatic works would pose the threat that some listeners, or even a single listener scanning the dial in his car with his son, might recognize a "taboo" or double-entendre synonym for one of the forbidden seven—or a word denoting some other sexual act.

The enormous range of these words, and the subjective judgments involved in weighing their nuances and potential impact on listeners of widely varying sensibilities, would require prodigious research in the standard reference works. The practical result would be that non-commercial radio stations would "steer wide" of innumerable works of merit rather than do this work or risk stumbling on a verbal land mine.

The risk is magnified because slang changes so rapidly. (SLANG AND ITS ANALOGUES, third page of Theodore Bernstein's introduction.) At what point would a radio producer be required to know that a phrase like "go down on" had become a slang synonym for "fellatio"? (THE AMERICAN HERITAGE DICTIONARY; see "down".) Or that a seemingly innocent slang expression had reacquired an older "taboo" meaning.

> *"Old hat* these days means out-of-date or not new. But in the 1700's the now-extinct meaning of the expression was—yes—the female pudendum." (SLANG AND ITS ANALOGUES, third page)

If "old hat" reacquired its earlier meaning, perhaps in response to the challenge of the Commission's order, would

an unsuspecting producer violate the order if he broadcast this old-new slang synonym for "cunt"?

The Commission's rationalization for the order do not justify its intrusion on the First Amendment.

1. The Commission defends its preemption of the editorial judgment of individual stations with the argument that broadcasting is an intrusive, a thrusting, medium. We submit this rationalization is invalid. Radio broadcasting is not more intrusive than a book. An offended reader can close the book. An offended listener can turn off the set—or tune to another station. Most listeners do this in a second or two when a program bores or irritates them.

In most broadcast areas, this leaves the listener with a large number of program options. WBAI, for example, is one of 84 AM and FM stations listed in the *New York Times* for the convenience of readers in that broadcast area. (N.Y. Times, March 20, 1978; p. C21)

Moreover, the Commission is not dealing with a situation in which a non-commercial station or stations had abdicated all editorial judgment and responsibility (a problem that requires solutions other than censorship.) The question was not whether WBAI had devoted so much of its time to programs containing dirty words that it was not serving the public interest of its audience. Nor have other non-commercial stations been afflicted with such a collapse of editorial judgment.

We have stressed non-commercial radio stations in our discussion because they are most affected. Commercial radio and television stations do not broadcast much (if any) reading from literary or dramatic works, and they are less

exposed to censorship under an order banning indecent *words*. This also is true, to a large degree, of public television.

2. The second rationalization offered by the Commission for its order is the need to protect children against any exposure to the seven words if they listen to non-commercial radio. This rationalization is invalid. In imposing a ban that violates the First Amendment, even for children, the Commission acted on some very tenuous assumptions as to the need for the order. For example: it does not know how many of the children (in various age groups) who actually listen to WBAI have heard or read the seven forbidden words in their homes; or in the streets, subways, schools, libraries, playgrounds, paperback bookstands, or record shops of their metropolitan area.

Moreover, the Commission can safely assume that most of the children protected by its order against a 9 PM or 10 PM broadcast of the Carlin monologue actually would be watching television at that time, often without parental supervision. And the Commission is well aware of the television fare which these children, unprotected by any censorship order, could choose from.

> "Just this season, Edith Bunker survived a rape attempt and discovered that her deceased spinster sister was a lesbian. 'Baretta' explored the sleazy world of male prostitution, while 'Police Woman' exposed a white-slave ring specializing in teen-agers. NBC dealt with an incest fantasy ('Sharon: Portrait of a Mistress'), the seduction of a gigolo by a 15-year-old girl ('Aspen') and nymphomania and female frigidity ('What Really happened to the Class of '65?') In two weeks, NBC will test just how far television can go when it presents a six-hour, three-part adaptation of 'Loose Change,' Sara Davidson's let-it-all-hang-out memoir of the 60's counter-culture. The mini-series offers up two deflowerings, a teacher exposing himself to his class and a woman finally achieving her first climactic orgasm—out of wedlock of course—after ten years of failure." (NEWSWEEK, February 20, 1978; p. 54)

None of these programs would be barred by the order, so long as the seven words were not used. Against this background, the Commission's ban on seven *words,* words which were not used in any depiction of conduct, reveals itself for what it is—a pointless triumph of taboo over freedom of expression in a dedicated medium whose producers and broadcasters require the full protection of the First Amendment.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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Certificate of Service

I, IRWIN KARP, a member of the Bar of this Court, certify that three copies of the Brief of the Authors League of America, Inc., as *amicus curiae* was served by mail this 24 day of March, 1978, on counsel for the respondent and on counsel for the petitioner.

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ON A WRIT OF CERTIORARI
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BRIEF OF AMICUS CURIAE COMMITTEE FOR OPEN MEDIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

PACIFICA FOUNDATION,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE COMMITTEE FOR OPEN MEDIA, SAN FRANCISCO CHAPTER

INTEREST OF AMICUS CURIAE

Amicus curiae is a citizens' group in the San Francisco, California area which has participated in licensing and rulemaking proceedings before the Federal Communications Commission. It represents the interests of citizens as affected by broadcasting stations, and has a strong interest in promoting robust, wide-open debate over broadcast facilities. The Commission's action here thwarts or

discourages such debate, for reasons developed within.

PRELIMINARY STATEMENT

The FCC has declared that certain language cannot be employed on the broadcast medium even if it has serious value in context unless the number of children in the audience is reduced to an unspecified minimum.1/ Thus, as discussed

1/ In its February 21, 1975 order (hereinafter referred to as "Order") the Commission recognized that, "In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what." (App. 14.) Yet, now it professes to be "puzzled" that an "ad hoc ruling on specific facts" should be examined to determine if the statutory definition purportedly applied was overbroad. (FCC Brief at 41, n. 30.) Instead it sub silentio asks the Court to hold it immune from the well-established principles of cases such as Gooding v. Wilson, 405 U.S. 518 (1972), requesting this Court for a license to apply, modify and extend its definition of indecency on a roving ad hoc basis. (Id. at 42-43.) Such maneuvers highlight the Commission's own confusion as to the meaning of indecency, and underscore the perils of divorcing the concept of indecency from obscenity. If precision is to remain the touchstone when First Amendment rights are at stake, the Commission's application for a roving license to censor must be denied.

below, the Commission would not permit major award-winning plays and other unquestionably valuable material to be presented on prime-time television. This the Commission would justify by sweeping references to the "special characteristics" of the broadcasting medium and by inept analogy to the law of nuisance.

"Channeling" valuable speech to times when millions do not watch or listen denies rights to both speakers and audiences. Thus the relevant analogy in the case is to Butler v. Michigan, 352 U.S. 380 (1957), not to Young v. American Mini Theaters, Inc., 96 S.Ct. 2440 (1976). The plurality opinion in Young holds that time, place and manner regulations of expression based upon content can survive First Amendment scrutiny if, but only if: (1) the regulations are designed to further substantial state interests beyond the fact that the materials are considered offensive or embarrassing,2/ and (2) the

2/ "The City Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of 'offensive' speech. In contrast, in Erznoznik...the justifications offered by the city residents rested primarily on the city's intent in protecting its citizens from exposure to unwanted 'offensive' speech." 96 S.Ct. at 2452, n. 34.

regulations do not restrict the access of distributors or exhibitors to the market or, conversely, do not restrict the viewing public's access to the regulated material.3/ Although the FCC seeks refuge in Young, it asserts no interest other than that the material is offensive to justify a regime which would greatly limit authors' and producers' access to the marketplace while simultaneously limiting the rights of tens of millions of persons whose viewing is confined to the early evening hours.4/ As in Butler, this Court should hold that adults cannot be limited to fare fit only for children.

3/ "There is no claim that distributors or exhibitors of adult films are denied access to the market, or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as one entity, the market for the commodity is essentially unrestricted." 96 S.Ct. at 2448. "The situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech." Id. at 2453, n. 35.

4/ Indeed, during the early evening hours, most children are supervised and the interests asserted by the FCC are correspondingly weak.

Perhaps even more serious is the assertion of purging "offensiveness" as an independent government interest. Offensiveness as a concept has been limited previously to two situations in First Amendment law. First, it has served to limit the sweeping language of Roth v. United States, 354 U.S. 476 (1957), i.e., even dominantly prurient material is protected if it is not patently offensive. Second, it has allowed individuals protection from receiving materials they regard as offensive provided that the enforcement of their rights does not deny the right of others to receive the materials. Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970); Martin v. City of Struthers, 319 U.S. 141 (1943). Indeed, in the absence of fighting words, material profoundly offensive to many has been routinely protected. Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, supra; Terminiello v. City of Chicago, 337 U.S. 1 (1949). If offensiveness were to be unshackled, majority tastes would replace the First Amendment, and our nation's deep commitment to "robust and wide-open" speech would be reduced to an empty slogan.

The Constitution cannot be cast aside by sweeping references to the special characteristics of the broadcast medium. Such characteristics are relevant to a determination of the prurience, the offensiveness, and perhaps the value of broadcast material; they do not justify the unprincipled abandonment of carefully developed First Amendment principles.

SUMMARY OF ARGUMENT

As the briefs of the parties fully set forth the proceedings below, amicus will not repeat them here. Briefly stated, on February 21, 1975, responding to a complaint against a broadcast by respondent's Station WBAI, the Federal Communications Commission issued an order defining the term "indecent" as used in 18 U.S.C. §1464. The District of Columbia Circuit Court of Appeals reversed the Commission's Order, finding it overbroad and vague and a violation of the Commission's duty to avoid censorship under 47 U.S.C. §326.

The Commission's Order drastically restricts the broadcast of nonobscene material, prohibiting it from the air when children are likely to be in the audience, and only hinting that a less restrictive standard might be invoked when the number of children in the broadcast audience is reduced to a minimum. Under the Order, programs containing "indecent" language cannot be broadcast when children are in the audience even if the programs have serious literary, artistic, or political value. The merits of the programs are irrelevant. Moreover, as demonstrated by the Carlin broadcast itself, material need not appeal to the prurient interest of anyone to be subject to the Commission's restriction.

Although the Commission emphasizes that its Order is not a complete prohibition of "indecent" matter but rather a "channeling" of that material to certain

time slots, its ban is absolute with respect to many members of the broadcast audience who watch TV or listen to the radio only during the afternoon and early evening hours. The proscription is also absolute with respect to the many broadcasters who operate only during hours when children are likely to be in the broadcast audience.

Even accepting the Commission's characterization of its Order as mere "channeling", as a time, place, or manner regulation based on the content of expression, the Commission's Order can survive First Amendment scrutiny only if it furthers special and overriding governmental interests. None of the justifications advanced by the Commission are sufficiently compelling to allow such an abridgment of First Amendment rights.

"Indecent" language would include language that is neither obscene as to adults nor obscene as to children. Parents have a right to raise their children as they see fit, yet the Commission takes that right away from parents by removing many programs of unquestioned merit from the air during prime child-viewing hours. Further, under the veil of protecting unsupervised children, the Order reduces much of the adult population of this country to viewing and listening to only that which the Commission finds appropriate for children.

Neither is the fact that broadcasts are received by a "captive" audience in the home a reason to set new Constitutional

priorities for broadcasters. Members of the broadcast audience choose to bring the medium into their home, and they are free to turn the radio or TV off at any time.

Finally, by cutting the notion of prurience out of its definition of indecency, the Commission has defeated the fundamental purpose of the obscenity doctrine, to protect society from dangerous antisocial behavior that might be generated by commerce in prurient offensive matter. Standing alone, the Commission's unsupported assertion that offensive language debases and brutalizes people is not justification enough for carving out a new exception to the protections of the First Amendment.

I. IT IS UNCONSTITUTIONAL FOR THE GOVERNMENT TO PREVENT BROADCAST LICENSEES FROM PRESENTING MATERIAL OF SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE TO THOSE WHO WATCH OR LISTEN WHEN CHILDREN ARE IN THE AUDIENCE.

A. The Commission's Prohibition of Broadcasting Material of Serious Literary, Artistic, Political, or Scientific Value Is Absolute with Respect to Many Broadcasters and Members of the Broadcast Audience, and, in Any Event, Is an Impermissible Restriction of Protected Speech on the Basis of Content.

Since Roth v. United States, 354 U.S. 476 (1957), this Court has held that the First Amendment protections of freedom of speech and press do not extend to obscene material. Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 351, 354 (1972); Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973). Alert to the dangers of excluding a category of speech from the shelter of the First Amendment, the Court has defined obscenity to include only that material which, when taken as a whole under contemporary community standards (1) appeals to the prurient interest; (2) portrays in a patently offensive way sexual conduct specifically defined by the applicable law, and (3) lacks serious literary, artistic,

political or scientific value. Miller v. California, supra, at 24.

The FCC, relying principally on 18 U.S.C. §1464, which makes it a crime to broadcast "indecent language," defines "indecent" as referring to language which "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs" when broadcast at a time when children are in the audience. (App. 15, 16, 17.) The Commission states that "indecent language," as defined in the Order,

> "is distinguished from obscene language in that it (1) lacks the element of appeal to the prurient interest...and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value."

In a "clarifying" order issued March 25, 1976 (App. 15), the Commission states that the indecency standard will be lifted where two circumstances are present: (1) where public events likely to produce offensive speech are covered live, and (2) where there is no opportunity for journalistic editing. In addition, when the number of children in the audience is "reduced to a minimum," indecent language "might conceivably" be allowed where sufficient warnings are given to consenting adults and in the context used the

language has serious literary, artistic, political or scientific value. (App. 43, 44.)

To comprehend the enormous scope of the Commission's new standard, it is helpful to consider some of the material it would restrict.5/ The Commission's Order abridges much political speech, such as many of the Nixon tapes, or a description of the events which led to the resignation of Earl Butz, former Secretary of the Department of Agriculture. Parts of the Bible could not be read.6/ Many award-winning plays would be barred, such

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5/ In this connection we note only matter in which one of the seven words objected to in the Carlin broadcast is present. While those were the only words specifically mentioned in the Commission's Order, there are many other words which would fit the Commission's general description of "indecent" language, presumably outlawing a vast number of additional works from the air. The problem of the vagueness of the Commission's standard, whereby words such as "shit," "piss," and "tit" are "indecent," but "fart," "turd," and "twat" (which were also mentioned in the Carlin broadcast but not commented upon by the FCC) apparently are not, is discussed in respondent's brief and is outside the scope of this brief.

6/ See, e.g., I Kings 14:10 and II Kings 9:8 (King James version).

as "Equus," "The River Niger," "Short Eyes," and "The Great White Hope." Most ironically, it would even prohibit the broadcast of its own decision barring such words.

The Commission attempts to justify the new indecency standard by terming it "channeling" rather than an actual prohibition. (App. 14.) The apparent basis for the Commission's "channeling" label is its statement in the Order that when the number of children in the audience is reduced to a minimum, indecent language "might conceivably" be allowed. (App. 15-16, 18, 43, 44.) However, such a characterization cannot disguise the effect of the Order, which is to prohibit altogether the broadcast of a wide range of material with respect to many broadcasters and members of the public.

There is no time other than the very early morning hours, when most broadcasters do not operate and most audience members do not listen, that the number of children in the broadcast audience is "reduced to a minimum."7/ For example, as the Court of Appeals noted, there are over a million children between the ages of two and eleven in the television

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7/ The extreme vagueness of the terms "children" and "at a minimum" raises constitutional questions which respondent has addressed in its brief to this Court and which are beyond the scope of the brief of amicus.

audience until 1:00 A.M.8/ That court concluded that "as long as such large numbers of children are in the audience the seven words noted in the Order may not be broadcast." (App. 53.)

Regardless of the hour when the number of children in the audience is thought to be "reduced to a minimum," the Commission's ban is absolute with respect to a large proportion of the broadcast audience,9/ including (1) adults who watch TV (or listen to the radio) only during the early evening hours; (2) children who watch TV only during the early evening hours; and (3) parents who want their children to be able to view the prohibited

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8/ Statement of John A. Schneider before the House Subcommittee on Communications, July 15, 1975, p. 9. The Commission's statistics show that in Washington, D.C., teenagers compose 14.1% of the TV audience at 8-9 P.M. and 10.9% at 11 P.M.-12 A.M.; and in another survey of New York and Los Angeles, children aged 11-17 represent 13% of the audience from 9-11 P.M., and those aged 6-11 constitute 5%. See Eastern Educational Radio (WUHY-FM), 24 FCC2d 408, 411, n. 6 (1970).

9/ Using January, 1974 as a sample month, Nielsen estimates that about 70% of television households were watching 9-10 P.M., about 46% at 11 P.M., and 25% at 12 A.M. "A peak is reached generally between 8-10 P.M. followed by a sharp decline at the end of the evening." Nielsen Television, 1975 at p. 7.

material, where the children watch TV only during the early evening hours. The Commission's prohibition is also absolute with respect to many broadcasters; for example, roughly one-half of the approximately 4,500 AM radio stations are daytime only stations.

Furthermore, this Court has long held that restrictions on the time, place or manner of expression based on its content are impermissible unless enacted to further substantial governmental interests. Young v. American Mini Theaters, supra; Erznoznik v. City of Jacksonville, supra; Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976). As discussed above in the Preliminary Statement, the FCC's interest in purging the air of offensive language is clearly not sufficient to sustain its prohibition. While the Commission correctly points to certain characteristics that distinguish broadcasting from other media, those qualities cannot serve as the basis for such a drastic reduction of First Amendment rights of both broadcast licensees and broadcast audiences.

B. The Justifications Advanced by the Commission Are Not Sufficient to Allow Restriction of the First Amendment with Respect to the Broadcast Media.

1. The Presence of Unsupervised Children in the Broadcast Audience Is Not a Reason to Allow Curtailment of First Amendment Protection of Broadcast Material.

Primary among the reasons given by the Commission in support of its Order is the concern that unsupervised children will be exposed to language which many parents would regard as inappropriate for their children to hear. The Commission reasons that the First Amendment does not apply in the same manner to broadcasters as to all other media, largely because of the likelihood of unsupervised children being present in the broadcast audience. To be sure, the Government has a special interest in the well-being of children and "...can adopt more stringent controls on communicative materials available to youths than those available to adults." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975). To that end, this Court adopted a "variable obscenity" standard in Ginsberg v. New York, 390 U.S. 629 (1968), adapting the then-applicable obscenity standard of Roth v. United States, supra, and Memoirs v. Massachusetts, 383 U.S. 413 (1966), to children by permitting the prurient appeal of

material to be assessed in terms of the sexual interests of minors. While the effect of Miller v. California, supra, upon the Ginsberg formulation has yet to be determined by this Court, "[i]t is clear, however, that under any test of obscenity as to minors...to be obscene 'such expression must be, in some significant way, erotic.' Cohen v. California, 403 U.S. 15, 20 (1971)." Erznonik v. City of Jacksonville, supra, at 213, n. 10.

The Carlin broadcast was in no way erotic; indeed, the Commission frankly states that appeal to the prurient interest, of either children or adults, is not a requisite of indecent language under the new formulation. (App. 15.) Thus, the Commission's Order, stemming principally from a concern for protection of children, prohibits broadcasting language obscene as to no one, neither adults or children. The result is an anomaly whereby a child cannot listen to the Carlin show over the radio but is free to buy a record or book containing the same language.10/ In fact, children are free to buy materials utterly without redeeming literary, artistic, political or social

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10/ In this respect, the Commission's reliance upon Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971), aff'd sub nom Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), in which the District Court upheld the Commission's ban on cigarette advertising, is misplaced because cigarettes cannot be sold to minors in most states. (See FCC Brief at 36.)

value so long as the use of offensive language is not erotic.

Further, children can even buy matter that does appeal to their prurient interest as long as it does not lack serious literary, artistic, political or social value. But the Commission's action would forbid them from listening to or viewing works of unquestioned artistic, or political or educational merit. This result is particularly anomalous in view of the fact that because the television and radio are in the home, parents, particularly in the early evening hours, can supervise and select the material that their child may view more easily than they can control what materials the child buys at a store or acquires from a friend. The problem of children obtaining access to obscene or indecent material against a parent's wishes is certainly a serious one, but no more troublesome with respect to broadcast matter than printed matter.

The Commission's Order would thus be a clear violation of the First Amendment rights of children in the broadcast audience who are prevented from receiving "indecent" matter which is not obscene. As this Court stated in Erznoznik, supra, at 213-214:

> "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images

that a legislative body thinks unsuitable for them."

See also, Carey v. Population Services International, 97 S.Ct. 2010, 2025 (1977).

Equally important, the Commission's action would violate the rights of adults to receive material prohibited by the Order. As the statistics cited above demonstrate, many adults watch television and listen to the radio only during hours when large numbers of children are in the broadcast audience. As to those adults, the Commission is forbidding presentation over the broadcast media of countless programs and works of great value. The millions of people who rely solely or principally on the broadcast media for their education and entertainment will be denied access altogether to many artistic works as well as news broadcasts11/ and other valuable programs.

Such a restriction is even more offensive than that struck down by this Court in Butler v. Michigan, supra. In that case the challenged staute forbade the publication, sale or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of

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11/ A large proportion of news and public affairs broadcasts are not broadcast live but are taped, and apparently would not fall within the exception to the indecency standard presented in the Commission's "clarifying" order. (See App. at 43.)

morals of youth," 352 U.S. at 381, a much narrower class of material than that prohibited by the Commission's Order in the instant case. In finding that statute unconstitutional, the Court stated,

> "The State insists that, by...quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig....
>
> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual...that history has attested as the indispensable conditions for the maintenance and progress of a free society." 353 U.S. at 383-384.

The Commission must not be permitted to reduce the adult population of this country to viewing and listening to only that which the Commission finds appropriate for unsupervised children. Surely the Commission cannot forbid dissemination to both adults and children over the broadcast media of the same material that

could not constitutionally be kept from them if it were in a printed form.12/

The Commission cites Wisconsin v. Yoder, 406 U.S. 205, 214 (1972), and the cases cited therein for the proposition that "[the] parental interest [in raising children as the parent sees fit] has 'a high place in our society.'" (App. 14.)

12/ It is ironic that the Commission relies so heavily upon the prospect of unsupervised children watching or listening to offensive language broadcast in the home to distinguish the broadcast media from the printed media. In Paris Adult Theater I v. Slaton, supra, this Court made note of evidence that, although most pornography may be bought by adults, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." 413 U.S. 49, 58, n. 7, citing The Report of the Commission on Obscenity and Pornography 40o (1970). Despite the habitual acquisition by children of material not legally available to them, the Court has still found it inappropriate to prohibit this material altogether merely to protect children. A fortiori, the Court should not prohibit presentation on the broadcast media of material just to protect the unsupervised children who might be in the audience.

Yet, the Commission then purports to act in loco parentis, in that by banning offensive language from the air, it takes over the parents' job and protects children against hearing what it deems improper language. However, as Chief Judge Bazelon points out in his concurring opinion below, Yoder and the earlier cases of Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) hold that parents, not the Government, have the right to make certain decisions regarding the upbringing of their children. The Commission's Order would fly in the face of these decisions by placing the power of censorship in the hands of Government rather than parents. Parents who desire their children to be able to view or listen to the many programs with literary, artistic, political or social value that are banned by the Commission's Order, or indeed any program containing "indecent" language, are denied that right in violation of Yoder, Pierce, and Prince.13/

13/ In this respect, the instant case is distinguishable from other cases in which the Court has upheld a restriction of the dissemination of material to children. See, e.g., Ginsberg v. New York, supra. Where the subject of restriction is printed material, parents are free to purchase the material for their children if they so desire, whereas parents who want their children to see programs covered by the Commission's Order will be denied all access to such programs.

2. Other Justifications Given by the Commission for Denying the Broadcast Media the Same Constitutional Protection Afforded to Other Media are Insufficient.

(a) Scarcity of Spectrum Space.

Another reason given by the Commission for treating broadcasting specially is that "there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest." (App. 13.) This argument, based on Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), is answered fully by Chief Judge Bazelon's concurrence in the judgment below. (See App. at 89.) Amicus would add only that the harmony of all the First Amendment interests involved in the case at hand is even more complete than Judge Bazelon noted. Whereas in Red Lion the First Amendment rights of people desiring to use the broadcast media to disseminate information weighed against the right of broadcasters to be free from content regulation by the Government, in the instant case the rights of such people are in harmony with both broadcasters' interest in freedom from Government control and the interests of the broadcast audience in selecting from among a broad range of programs. Therefore, none of the compelling interests that in Red Lion made the Court uphold the constitutionality of the personal attack and political editorializing portions of the fairness doctrine would justify

upholding the Commission's Order in the instant case.

(b) Captive Audience in the Home.

Another basis for the Commission's Order is the fear that radio and television broadcasts come into the home, where they are sampled in a "smorgasbord" manner, and thus that they may constitute an unwarranted "...intrusion into the home of unwelcome views and ideas..." (citing Cohen v. California, supra). (App. 12, 16.) In Cohen, this Court stated,

> "The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." 403 U.S. at 21.

But the Court's decisions demonstrate clearly that no such invasion is taking place at the hands of the broadcasters. In both Erznoznik, supra, and Cohen, supra, this Court held that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' Cohen v. California, supra, at 21." 422 U.S. at 210-211. Unlike "raucous emissions of sound trucks blaring

outside...residences," which have been held an intolerable invasion of privacy,14/ a television or radio is voluntarily brought into the home and can easily be turned off. See Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974)(quoting Packer Corp. v. Utah, 285 U.S. 105 (1932), "The radio can be turned off, but not so the billboard or street car placard.")

Those who were listening to WBAI before the Carlin monologue was broadcast were warned that the program included sensitive language; thus they could not constitute a "captive audience." The Commission's concern lies with those who unwittingly turned to WBAI in the middle of the monologue and were subjected to offensive language without any warning. But the concept of an "unwilling listener" is inherently contradictory in the case of a television or radio in one's own home, since the listener can readily tune to another station. Nevertheless, to protect that "unwilling listener" from this momentary annoyance, the Commission totally cuts off the ability of the station to broadcast, and of many other listeners to receive, serious literary, artistic, political and scientific presentations. That is precisely what this Court warned against in Cohen and Erznoznik.

14/ Cohen v. California, supra, at 21, referring to Kovacs v. Cooper, 336 U.S. 77 (1949).

Finally, the Commission's reliance on Rowan v. United States Post Office Department, supra, is misplaced. Rowan upheld the constitutionality of a law permitting an addressee to take his name off mass circulation mailing lists. In the instant case, the Government has made the choice that Rowan left to the addressee, by declaring that even the willing listener cannot receive the material.

In sum, no justification put forward by the Commission is sufficient to allow forbidding the presentation over the broadcast media of material protected by the First Amendment. Without making light of what is admittedly a serious problem for parents, amicus respectfully submits that the sweeping prohibition of material of serious literary, artistic, political and scientific value is not an appropriate, nor constitutional, solution. The possibility that a few children will hear language offensive to some but not obscene is insufficient to justify the blanket denial to broadcasters of the right to present, and to both adults and children the right to receive, a broad range of interesting and educational material.

II. THE COMMISSION'S INDECENCY STANDARD, BY DIVORCING PATENT OFFENSIVENESS FROM PRURIENCE, UNDERCUTS THE FUNDAMENTAL PURPOSE OF THE OBSCENITY EXCEPTION TO THE FIRST AMENDMENT AND IS THUS UNCONSTITUTIONAL.

In its Order, the Commission points out that the proposed indecency standard differs from the Miller obscenity test in two major respects: (1) when children may be in the audience, indecent language cannot be redeemed by a claim that it has literary, artistic, political or scientific value; and (2) it lacks the element of appeal to the prurient interest. The unconstitutionality of the first factor was discussed at length in Part I of this brief. Just as that aspect alone invalidates the new indecency standard, similarly, the second element standing alone is sufficient to render the Commission's ruling unconstitutional under the First Amendment.

Appeal to the prurient interest has always been central to the Court's definition of obscenity. In Roth v. United States, supra, this Court found obscene material to be that "which deals with sex in a manner appealing to the prurient interest." Finding such material to be "utterly without redeeming social importance," the Court added,

> "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as

> a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..." Roth, supra, at 484-85 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572).

Memoirs v. Massachusetts, supra, narrowed the Roth obscenity standard to only certain material which appealed to a prurient interest. To be obscene, first, such material had to be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Second, even if material appealed to the prurient interest and was patently offensive, it still was not obscene unless it was "utterly without redeeming social value." 383 U.S. at 418. Most recently, in Miller v. California, supra, this Court further refined the Roth-Memoirs standard by requiring that, to be obscene, the work must (1) depict or describe in a patently offensive way, conduct specifically defined by the applicable state law; and (2) lack serious literary, artistic, political or social value. 413 U.S. at 24.

Thus, prurience has always been at the heart of the Court's definition of obscenity; it is the very reason for the obscenity exception to the First Amendment. Miller and the entire line of obscenity cases hold that a state may act on the

"...assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior;" and that "...crass commercial exploitation of sex" has "a tendency to injure the public as a whole, to endanger the public safety... Paris Adult Theater I v. Slaton, supra, at 63, 69 (1973). The Commission's concern, on the other hand, is entirely different--to ban "obnoxious, gutter language," which it claims "has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions." (App. 15.) While the use of such "gutter" language may be a disturbing phenomenon worthy of Government attention, the crucial issue is whether the use of such language is a social evil like hard-core pornography that the Government can properly outlaw.15/

15/ It is difficult to comprehend the logic of the Commission's construction of 18 U.S.C. §1464, even acknowledging the concerns which prompted its Order. Under the Commission's indecency standard, where language is at issue, prurience need not be shown in order to demonstrate a violation. But where photographic portrayals are at issue, offensiveness will not suffice; prurience must be shown. Non-prurient offensive pictures are thus protected; non-prurient offensive language is not. This is statutory and constitutional nonsense.

Amicus submits that there is no basis for Government to bar the use of such language on the broadcast media. These offensive words are

> "...in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." Cohen, supra, at 25.

See Erznoznik, supra; Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518, 527 (1972)(A statute that "makes it a 'breach of peace' merely to speak words offensive to some who hear them...sweeps too broadly").

Furthermore, while frequently such gutter expressions as those at issue in this case are used in a manner debasing to the language and demoralizing to society as a whole, in most of the programs that would be restricted by the Commission's Order, use of such expressions serves a real purpose. A licensee, chosen because

he is responsible and has requisite character qualifications, will permit use of such language over his facilities only when he believes it serves a valid purpose.16/ As the Commission itself states,

> "In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." (App. 18.)17/

Nor can the Commission shelter its Order with the argument that outlawing only a few carefully selected words is of minor consequence because the ideas behind the words can be conveyed through use of protected language. As Mr. Justice Harlan stated in Cohen, supra, at 25-26:

16/ See 47 U.S.C. §308(b); WMOZ, Inc., 36 FCC 202, 237, n. 85 (1964); Jack Straw Memorial Foundation, 29 FCC 2d 334, 354 (1971); Pacifica Foundation, 36 FCC 147 (1964); cf. Eastern Educational Radio, supra, 24 FCC 2d at 413, 418-420.

17/ Section 326 of the Communications Act, 47 U.S.C. §326, prohibiting the Commission from interfering with licensee discretion in programming, verifies that licensee responsibility is the proper means of selecting programs for broadcast, not Government censorship.

> "...we cannot overlook the fact...that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

Also, the possibility of the Government using censorship of particular words as a guise for banning the expression of unfavored ideas lurks all too close behind the Order's innocent appearance.

Acknowledging the dangers of banning any form of expression, the Court has long intimated that obscenity is the only category of speech that is unprotected because of its offensiveness. Miller, supra, at 19-20, 23-24, 27; Roth, supra, at 476, n. 1; Hamling v. United States, 418 U.S. 87 (1974); United States v. Twelve 200 Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973). Through its definition of "indecent language" as used in

18 U.S.C. §1464, the Commission has created a new category, one which cannot be sustained. Were the Court to find otherwise and give the term "indecent" a new meaning different from "obscene," it would undermine all of its earlier decisions that so carefully confined this exception to the First Amendment.

CONCLUSION

At bottom, in the absence of obscenity, the question is whether government or the broadcast licensee should decide what material is appropriate for a particular community and what material is not.

> "For better or worse, editing is what editors are for; and editing is selection and choice of material.... Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility--and civility--on the part of those who exercise the guaranteed freedoms of expression."
> CBS, Inc. v. Democratic National Committee, 412 U.S. 124-125 (1973).

The fact that vulgar language is rarely heard on radio or television is witness to the fact that licensees habitually program with sensitivity to the needs of their communities. If anything, licensees have been too reluctant to take chances, too afraid to offend. No need, compelling or otherwise, is present to require fundamental First Amendment reformulations.

In Sonderling Broadcasting Corp., 27 P&F Radio Reg.2d 1508, 1517 (1973) aff'd sub nom. Illinois Citizens Committee v. FCC, 515 F.2d 397, reh. denied, 515 F.2d 407 (D.C. Cir. 1975), the Commission pledged that it "will not--indeed cannot--insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners." The Court should hold the Commission to this important promise if it is to be true to the principles that gave rise to the First Amendment protections of speech and press.

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FOR ARGUMENT

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PACIFICA FOUNDATION,
Respondent.

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BRIEF FOR AMICI CURIAE

AMERICAN BROADCASTING COMPANIES, INC.
CBS INC.
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NATIONAL BROADCASTING COMPANY, INC.
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BRIEF FOR AMICI CURIAE

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NATIONAL BROADCASTING COMPANY, INC.
NATIONAL RADIO BROADCASTERS ASSOCIATION
PUBLIC BROADCASTING SERVICE
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

OPINIONS BELOW

The *Memorandum Opinion and Order ("Order")* of the Federal Communications Commission ("Commission") was released on February 21, 1975 and is reported at 56

F.C.C.2d 94 (App. 6).* A *Memorandum Opinion and Order* of the Commission granting in part and denying in part a petition for clarification or reconsideration was released March 23, 1976 and is reported at 59 F.C.C.2d 892 (App. 41) *("Reconsideration")*. The decision of the Court of Appeals for the District of Columbia Circuit in *Pacifica Foundation* v. *FCC*, reversing the Commission's *Order*, was issued March 16, 1977 and is reported at 556 F.2d 9 (App. 45).

QUESTIONS PRESENTED

1. Whether Section 1464 of the Criminal Code, which prohibits the broadcast of "obscene, indecent, or profane" material, should be construed to prohibit the broadcast of materials which are not obscene and are protected under the First Amendment.

2. Whether, in the face of Section 326 of the Communications Act, the Federal Communications Commission may proscribe the broadcast of non-obscene material which is not prohibited by Section 1464 but which the Commission deems "offensive" or "indecent."

INTERESTS OF AMICI CURIAE

This Brief Amicus Curiae is submitted with the consent of the parties by:

American Broadcasting Companies, Inc.
CBS Inc.
National Broadcasting Company, Inc.
National Association of Broadcasters
National Radio Broadcasters Association
Public Broadcasting Service
Radio Television News Directors Association
Reporters Committee for Freedom of the Press

* Citations herein are to the pages of the Commission's Appendix.

American Broadcasting Companies, Inc., CBS Inc., and the National Broadcasting Company, Inc., are the owners of radio and television broadcasting stations and the operators of radio and television broadcasting networks. Amicus Public Broadcasting Service distributes national programming and provides other program-related services to the nation's public television stations. These amici believe that broadcasters should and do exercise good judgment and responsibility in the presentation of potentially offensive material. These amici have a vital interest in the policies of the Commission set forth in the *Order* under consideration here. Their interests as journalists and broadcasters of entertainment, cultural and public affairs programs will be severely affected if the Commission's *Order* is sustained. They believe that granting the Commission the power claimed here would strike at the heart of the First Amendment.

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television broadcast stations and networks. As of March 21, 1978, NAB's membership included 2550 AM radio stations, 1924 FM stations, 556 television stations, and the major nationwide commercial broadcast networks. One of NAB's objectives, according to its by-laws, is "to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcast industry to the end that it may best serve the public." Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of "freedom of the press." For this reason, NAB is particularly concerned about the Commission's asserted power to censor non-obscene broadcast material.

The National Radio Broadcasters Association is a non-profit organization with a membership of approximately

1000 AM and FM radio broadcast stations throughout the United States. The Association believes that the First Amendment interests of broadcasters and the public should remain free and unfettered in order to permit full development of the aural broadcast medium and its service to the public. The Association appears as amicus in this case because it believes the Commission's *Order*, if left standing, will greatly impair major First Amendment interests.

Radio Television News Directors Association ("RTNDA") includes approximately 1500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast throughout the nation. RTNDA joins in this brief to emphasize the importance of the case in terms of its potential impact upon news and public affairs programs.

The Reporters Committee for Freedom of the Press is a legal research and defense fund devoted to protecting the First Amendment interests of the news media and the public. The Committee appears as amicus in this case because it firmly believes that the Commission's *Order*, if upheld, will abridge the public's right to be informed and seriously restrict the right of the press to carry out its traditional role of informing the public of news of political, social and cultural importance.

STATEMENT

Respondent Pacifica Foundation is a non-profit corporation organized under the laws of California. It is the licensee of six radio stations: KPFA (FM) and KPFB (FM), Berkeley, California; KPFK (FM), Los Angeles, California; KPFT (FM), Houston, Texas; WBAI (FM), New York, New York; WPFW (FM), Washington, D.C. These stations are supported by voluntary annual listener subscriptions and foundation grants. There is no commercial advertising. The Pacifica stations are generally recognized in the industry as presenting specialized programming of interest to a relatively highly educated audience.[1] Although Pacifica's programming has at times been controversial and has before been made the subject of Commission inquiry,[2]

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[1] As stated in its Articles of Incorporation, Pacifica's broadcasting purpose is:

> "(c) . . . to encourage and provide outlets for the creative skills and energies of the community; to conduct classes and workshops in the writing and producing of drama; to establish awards and scholarships for creative writing; to offer performance facilities to amateur instrumentalists, choral groups, orchestral groups and music students; and to promote and aid other creative activities which will serve the cultural welfare of the community.
>
> "(d) . . . to engage in any activity that shall contribute to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purpose of this Corporation, to promote the study of political and economic problems and of the causes of religious, philosophical and racial antagonisms.
>
> "(e) . . . to promote the full distribution of public information; to obtain access to sources of news not commonly brought together in the same medium; and to employ such varied sources in the public presentation of accurate, objective, comprehensive news on all matters vitally affecting the community."

[2] In one inquiry, for example, the Commission considered complaints from listeners directed at broadcasts of poems authored and

Pacifica "licenses have been granted and renewed with attendant public interest findings over the years." [3]

At 2:00 p.m. on a Tuesday afternoon, October 30, 1973, Pacifica's New York station, WBAI (FM), broadcast its regularly scheduled live program, "Lunchpail," a discussion program which generally treats matters of public interest (App. 8-9). "Lunchpail" is the type of program that would be classified as public affairs by most commercial broadcast stations. During the October 30, 1973, program, the host discussed and analyzed society's use of language (App. 9). No recording was made of the broadcast, and the precise nature of the discussion is not reflected in the record (App. 11). However, it appears that in the course of the program, the host played a monologue from a record album recorded by George Carlin (App. 9),[4] a comedian of considerable stature in his profession, whose routines, like the one here, often satirize American manners and language. The Carlin album, including the

---

read by Lawrence Ferlinghetti, Edward Albee's "Zoo Story," and a panel discussion by eight homosexuals discussing their attitudes and problems. *Pacifica Foundation*, 36 F.C.C. 147 (1964). Complainants had objected to the materials as "offensive" and "filthy." *Id.* at 148. The Commission found, however, that the broadcast of limited portions of the Ferlinghetti poems was contrary to Pacifica's own program standards and occurred inadvertently. The Commission found, moreover, that the panel discussion and the "Zoo Story" broadcasts were "well within the licensee's judgment under the public interest standard," *id.* at 148, noting that "the licensee's judgment in this freedom-of-speech area is entitled to very great weight and that the Commission, under the public-interest standard, will take action against the licensee . . . only where the facts of the particular case, established in a hearing record, flagrantly call for such action." *Id.* at 150-51.

[3] *Pacifica Foundation*, 43 F.C.C.2d 1193, 1195 (1973) (Comm'r Hooks concurring in part and dissenting in part).

[4] George Carlin, "Occupation: FOOLE," cut 5, side 2 (Little David Records, LD 1005). Verbatim transcripts of the monologue appear in the Commission's *Order*, *supra*, 56 F.C.C.2d at 100-02 (App. 19-24), and in the court of appeals' opinion, 556 F.2d at 37-40 (App. 109-14).

monologue involved here, is apparently available in record stores throughout the country.

Immediately prior to the broadcast of the monologue, listeners were carefully advised that it contained language which might be regarded by some as offensive (App. 9-10). It was suggested that anyone who felt he might be offended should change stations and return to WBAI after 15 minutes. The monologue, entitled "Filthy Words," was then broadcast. During the monologue's twelve minutes, George Carlin humorously discussed society's use of and attitude toward the words which the Commission here claims are indecent. In the course of the monologue, the words themselves were used frequently with examples of the various shades of meaning to which these words have been subjected. There is no evidence in the record that the station advertised in advance that it would broadcast this monologue or that the station sought to attract listeners who would not otherwise have listened to the broadcast. The Commission found that the broadcast did not have a prurient appeal. *See Order*, *supra*, 56 F.C.C.2d at 98-99 (App. 14-17).

Only one complaint was received about the broadcast. It was made by a man who heard the broadcast while driving in a car with his young son, whom he allowed to listen to the broadcast (App. 8). The record does not reveal whether the complainant heard the warning preceding the monologue's broadcast; nor does it reveal why, after hearing the initial portion of the broadcast, the complainant did not turn off his radio or change to another station.

The Commission forwarded the lone complaint which it received to WBAI with a request for comments, and WBAI replied, describing the nature of the broadcast, the monologue's relation to the broadcast, and the nature of the monologue and its artist (App. 3-4). WBAI's response noted that Carlin's monologue "shows us that

words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words" (App. 4). No other comments were received.

On February 21, 1975, the Commission released its *Order* "pursuant to" Section 1464 of the Criminal Code, 18 U.S.C. § 1464, which prohibits the utterance "by means of radio communications" of "any obscene, indecent or profane language." [5] The Commission did not find that the broadcast was obscene,[6] and indeed conceded that such a finding could not have been supported. *See Order*, *supra*, 56 F.C.C.2d at 97-98 (App. 14-17). Instead the Commission found that the broadcast was prohibited because it was "indecent," without regard to the broadcast's literary, artistic, or intellectual merit. The Commission gave four reasons in its *Order* justifying regulation of the broadcast of "indecent" material: (1) children in many cases have unsupervised access to radios, (2) radio receivers are in the home, (3) unconsenting adults may inadvertently tune into offensive broadcasts, and (4) scarcity of spectrum space requires licensing in the public interest. *Id.* at 97 (App. 13).

The Commission defined as "indecent" the broadcast of "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 98 (App. 15). Such language, which the Commission also described as "[o]bnoxious, gutter language," *id.*, was held to be prohibited even if it lacks

[5] 56 F.C.C.2d at 99 (App. 18). The Commission also stated that its *Order* was issued "in furtherance of [its] statutory obligation to promote the larger and more effective use of radio in the public interest," citing 47 U.S.C. § 303(g). 56 F.C.C.2d at 99 (App. 18).

[6] The *Order* stated that it "[did] not deal with the somewhat different problem of 'obscene' language." *Id.* at 94-95 (App. 8).

appeal to the prurient interest. Finding that such language "[has] no place on radio . . . when children are in the audience," *id.*, the Commission stated that the particular broadcast was prohibited because the words were broadcast "at a time when children were undoubtedly in the audience (i.e., in the early afternoon)." *Id.* at 99 (App. 17). The Commission suggested that a different standard allowing for consideration of the intellectual value of the program "might conceivably" be used "[w]hen the number of children in the audience is reduced to a minimum," such as "during the late evening hours." *Id.* at 98 (App. 15-16).

There was no evidence in the record as to how many children, other than the complainant's son, listened to the broadcast; whether WBAI broadcast any programming at all directed to or attractive to children; or whether children listened to this FM station in any significant numbers. The Commission also did not consider whether early afternoon on a schoolday was a time when the number of children in the FM audience generally might have been reduced to a minimum, perhaps even below the number of children listening in the late evening hours.[7]

[7] Indeed, research suggests that other than between the hours of 12:00 a.m. and 6:00 a.m., when listening by all age groups is minimal, child audiences are at a minimum during the period including the 2:00 p.m. weekday time when the Carlin monologue was broadcast:

*Average-Quarter-Hour Persons 12-17 Using Radio Nationwide**

Day-Part	Monday-Friday (000)	%	Saturday (000)	%	Sunday (000)	%
6-10 AM	4,243	17.8	2,978	12.5	2,339	9.8
10 AM-3 PM	2,245	9.4	5,309	22.2	4,696	19.7
3-7 PM	5,236	21.9	4,453	18.6	4,394	18.4
7 PM-12 AM	4,178	17.5	3,811	16.0	3,440	14.4
12-6 AM	667	2.8	893	3.7	840	3.5

* Total number of persons 12-17 is 23,890,000. Data for children 2-11 is not compiled. Source: Statistical Research, Inc., RADAR 16 (Spring/Fall 1977).

Nor was there any evidence in the record that material such as that contained in the Carlin monologue was harmful to children.

The Commission declined to impose any sanction on WBAI, and issued only a declaratory order.[8] A declaratory order was used, according to the Commission, because it was a "flexible procedural device admirably suited . . . to clarify the standards which the Commission utilizes to judge 'indecent language'." *Id.* at 99 (App. 17).

Commissioner Reid issued a concurring statement maintaining that the language involved would "be totally inappropriate for broadcast at any time" but noting that the broadcasts which were the subject of the *Order* had been "engaged in by only a few careless broadcasters." *Id.* at 102 (App. 24). Commissioner Quello, in a concurring statement, rejected the majority's "view that such words are less offensive when children are at a minimum in the audience," asserting that "under no stretch of the imagination . . . [could] such words [be] broadcast in the context of serious literary, artistic, political or scientific value." *Id.* at 103 (App. 25-26).

Commissioner Robinson, in a concurring statement joined by Commissioner Hooks, accepted the principle that "indecent" programming may be proscribed, but noted that "absolutely crucial to my concurrence is the limited context in which this principle operates." *Id.* at 107 (App. 34). He emphasized the time at which the Carlin monologue was broadcast, stating that he would find the monologue had sufficient literary value to avoid being "indecent" if broadcast at a different hour, *id.* at 108 n.9

[8] Nevertheless, the Commission pointedly noted that "this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.* at 99 (App. 17).

(App. 36 n.9), and noting the "need for caution" lest in protecting children "we also undertake to regulate the tastes of adults." *Id.* at 109 (App. 39).

Amicus RTNDA petitioned the Commission for reconsideration and clarification, seeking a ruling "to the effect that the Commission 'does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as part of a bona fide news or public affairs program'." *Reconsideration, supra*, 59 F.C.C 2d at 892 (App. 42).[9] In addressing the Petition For Reconsideration, the Commission noted that its declaratory order "was issued in a specific factual context" and pointed to its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated," *id.* at 893 (App. 43-44). The Commission then denied RTNDA's petition, except to observe that when the broadcaster covers live events, the broadcaster would not be held responsible for indecent language. The Commission, however, qualified this limited clarification by providing that it applied only where the broadcaster "exercise[s] judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Id.* at 893 n.1 (App. 43 n.1).

Pacifica Foundation petitioned for review of the Commission's *Order* in the United States Court of Appeals for the District of Columbia Circuit. On March 16, 1977,

[9] RTNDA's petition before the Commission comprehensively described the nature of the material whose broadcast would be precluded by the Commission's *Order* and gave as an example the so-called "White House tapes." The Commission is, therefore, in error in asserting before this Court that it never had the opportunity to consider such materials as those relied on by Pacifica in the court of appeals below. (Br. at 21 & n.21, 43-44.) Nor could the Commission, in any event, defend a sweepingly phrased declaratory ruling on the ground that it did not know how words such as those at issue are used or that it did not know the types of literary works containing them.

the District of Columbia Circuit reversed the Commission. *Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (App. 45). In the opinion announcing the court's judgment, Judge Tamm found that despite "Commission claims that its *Order* does not censor indecent language but rather channels it to certain times of the day[, i]n fact the *Order* is censorship . . . ." *Id.* at 13 (App. 53). According to Judge Tamm, the Commission had ruled that "[a]s long as such large numbers of children are in the audience the seven words noted in the *Order* may not be broadcast." *Id.* at 14 (App. 53). He further found that the Commission's action "proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Id.* (App. 54). Judge Tamm therefore concluded that every use of the words proscribed by the Commission's *Order* could not be prohibited, even as to minors, and found that the *Order* was impermissibly overbroad. Judge Tamm also held that the Commission's failure to define children in its *Order* rendered it impermissibly vague. Although he found that the language proscribed by the Commission was not obscene under *Miller* v. *California*, 413 U.S. 15 (1973), and therefore, protected by the First Amendment, he declined to consider whether Section 1464 or the Criminal Code permits the Commission to regulate protected speech at all, and if so, whether that section is unconstitutional.

Judge Bazelon, in a concurring opinion, found that the Commission's *Order* violated the First Amendment. He concluded that the speech that the Commission labelled as "indecent" would be protected by the Constitution in other media and that nothing about the character of broadcasting justified a different treatment. Judge Leventhal, in a dissenting opinion, would have upheld the Commission's *Order* on the sole ground that it

was justified by the "compelling state interest" in the protection of children. *Id.* at 37 (App. 107).

The Commission's petition for a writ of certiorari to this Court followed, and certiorari was granted on January 9, 1978. In this Court, the Commission is not supported by the United States, which was a statutory respondent in the court of appeals.[10]

SUMMARY OF ARGUMENT

Invoking the prohibition against "obscene, indecent, or profane" broadcasts contained in Section 1464 of the Criminal Code, 18 U.S.C. § 1464, the Commission claims the authority to prevent the broadcast of material which is not obscene and which is protected by the First Amendment on the ground that it is "patently offensive as measured by contemporary community standards for the broadcast medium." The Commission does not and cannot point to any widespread use of "offensive" material in the broadcast media, and the broadcast industry clearly has demonstrated responsibility and good judgment in its treatment of such material.

Although the Commission has only proscribed here the broadcast of a comic monologue discussing society's use of and attitude toward "dirty words," the authority it has asserted would clearly extend much further. If successful here, the Commission would be placed in the position of a censor, free to forbid whatever is objectionable to "the most vocal and powerful of orthodoxies." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505 (1952). Neither Section 1464 nor anything in the Communications Act gives the Commission that power.

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[10] 28 U.S.C. § 2348.

The Commission has no such authority by virtue of its power to regulate broadcasting in the "public interest." *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). Section 326 of the Communications Act provides that "nothing" in the Act (including the public interest provisions) shall be construed to authorize censorship or interference with freedom of speech. This limitation on the Commission's power to utilize the public interest standard to censor particular programs is clearly confirmed by the Act's legislative history.

While Section 1464 was designed as a statutory exception to the prohibition on censorship, it only bars obscene broadcasts, and it does not give the Commission the authority to prohibit non-obscene material. This Court has construed the prohibition of "obscene" and "indecent" materials in statutes similar to Section 1464 (18 U.S.C. §§ 1461, 1462) as limited to obscenity. *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1937); *Roth* v. *United States*, 354 U.S. 476 (1957). Nothing in the legislative history suggests that Section 1464 should be construed differently.

Moreover, Section 1464 should be construed as limited to prohibiting obscenity in order to avoid serious constitutional questions. The statutory standard of "indecent" contained in Section 1464 has no commonly accepted meaning. It does not, therefore, satisfy First Amendment requirements of definiteness. *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968). The danger to First Amendment interests is evident from the widely varying constructions the Commission has given the term "indecent" over the years and from the broad and indefinite sweep of its *Order* in this case.

The Commission's *Order* also raises substantial constitutional questions apart from considerations of vagueness.

It is highly doubtful that the broadcast of non-obscene material may be prohibited for the reasons advanced by the Commission—spectrum scarcity, preventing intrusions on privacy, and protecting children. Spectrum scarcity warrants only very limited restraints on the First Amendment's protection of broadcaster editorial discretion, and then only to assure adequate representation of varying viewpoints on public issues. This Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969), specifically noted that that case involved "no question . . . of the Commission's refusal to permit the broadcaster to carry a particular program" and that such a restriction "would raise more serious First Amendment issues."

Protecting individual privacy from intrusion also does not justify restraints on programming since the individual may readily avoid any intrusion he finds objectionable by simply turning the radio or television dial. *Cohen* v. *California*, 403 U.S. 15 (1971); *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970).

Finally, the need to protect children cannot support the breadth of the prohibitions the Commission would impose here. Relegating broadcasts that the Commission considers "offensive" to times when child audiences are minimal would, because of work or sleeping habits, prevent adults from receiving a wide variety of programming, including contemporary plays, candid discussions of public affairs and complete and accurate news reporting. In protecting children, the Commission may not impair the rights of the adult population. *Butler* v. *Michigan*, 352 U.S. 380 (1957). Moreover, children cannot be prevented from hearing allegedly "indecent" words without any regard to the intellectual merit of the program in which they are used. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Cohen* v. *California*, *supra*.

ARGUMENT

INTRODUCTION

Although the facts of this case focus on a particular broadcast, the importance of this case is far greater. On the complaint of a single listener, the Commission—purporting to be guided by its own sense of contemporary community standards as to what is "patently offensive" and explicitly declining to consider literary, artistic, or intellectual merit as even relevant to the broadcast before it—banned the use of certain language on the airwaves. In so doing, the Commission has applied to the broadcast medium a standard which was rejected more than 40 years ago for the printed press. *See United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

Even before the Commission's *Order*, the Commission received thousands of complaints claiming that particular broadcasts were offensive to community standards of decency and seeking to invoke the Commission as an instrument of censorship.[11] These complaints condemn, and would have the Commission purge from the air, programs which in the judgment of the complainant lack " 'due regard for sensitivity, intelligence and taste.' " *Oliver R. Grace*, 22 F.C.C.2d 667, 667 (1970). Complaints have been received ranging from condemnation of ethnic jokes,[12] to disapproval of panel discussions by homosexuals,[13] to objection to the discussion of abortion on an entertainment series.[14] If the Court ultimately upholds the

[11] *See Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 418-19 (1975). *See also Order, supra*, 56 F.C.C.2d at 94 (App. 6).

[12] *Anti-Defamation Comm'n of the Polish American Congress*, 46 F.C.C.2d 124 (1974), *aff'd sub nom. Polish American Congress* v. *FCC*, 520 F.2d 1248 (7th Cir. 1975).

[13] *Pacifica Foundation*, 36 F.C.C. 147 (1964).

[14] *Diocesan Union*, 41 F.C.C.2d 297 (1973).

Commission's *Order*, the Commission will undoubtedly receive many more complaints of this nature.

At the heart of this case, therefore, is a question not of word usage but of Commission authority to act as a censor of the airwaves "set adrift upon a boundless sea amid a myriad of conflicting currents of [taste], with no charts but those provided by the most vocal and powerful of orthodoxies." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952).

The dangers to broadcasting which would result from sustaining Commission authority to regulate speech which might be found offensive are evidenced by the course the Commission's regulation has taken over the past few decades. During that period, the Commission has travelled its own freewheeling journey. In the name of the public interest, it reprimanded broadcasters for the broadcast of songs which were "vulgar and subject to double meaning"[15] and for programming containing language which was " 'coarse, vulgar, suggestive, and susceptible of indecent, double meaning'."[16] Then, reversing course, it stated that "it is not a matter of the Commission trying to rule off the airwaves the coarse or vulgar."[17]

In this case, under Section 1464, the Commission banned as "indecent" material that "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *See Order, supra*, 56 F.C.C.2d at 98 (App. 16). In an earlier decision, the Commission suggested that it could more broadly prohibit material

[15] *WREC Broadcasting Serv.*, 19 F.C.C. 1082, 1113 (1955).

[16] *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 255 (1962), *aff'd sub nom. Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

[17] *Sonderling Broadcasting Corp.*, 27 R.R.2d 285, 288, *recon. denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975).

merely "patently offensive by contemporary community standards." [18]

The Commission's *Order* here suggested that if children are in the audience in more than "minimal" numbers, the material may not be broadcast even if it has "serious literary, artistic, political or scientific value." [19] Indeed, the *Order* here appears to go so far as to prohibit any consideration of intellectual merit, for it only suggests that such merit "might conceivably" be considered when child audiences are minimal but otherwise states "indecent" broadcasts cannot be redeemed by intellectual merit when children "may be" in the audience.[20] In an earlier decision, the Commission required indecent material to be "utterly without redeeming value," regardless of the size of the child audience, before it could be banned.[21]

Quite evidently the Commission has had its own substantial difficulties in defining the scope of the prohibition of "indecent" material. Not surprisingly, the Commission urges that its standards may change again. Despite assertions in its *Order* that it was attempting to clarify the standards for "indecent," the Commission now argues before this Court that it is free in the future to modify or extend its standards or even to decide not to apply them. (Br. at 43.)

While the Commission suggests that action is necessary to protect the public from the "widespread use of indecent

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[18] *Eastern Educational Radio (WUHY-FM)*, 24 F.C.C.2d 408, 410 (1970).

[19] *See Order, supra*, 56 F.C.C.2d at 98 (App. 15-16).

[20] *See id.* (App. 15). "Surveys have indicated that some children will be viewing television during all hours of the broadcasting day . . . ." *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 423 (1975).

[21] *Eastern Educational Radio (WUHY-FM)*, 24 F.C.C.2d 408, 414 (1970).

language," *Order, supra*, 56 F.C.C.2d at 100 (App. 18), neither in its *Order* nor in its Brief in this Court does the Commission point to any widespread practice or problem in this area.[22] Nor is there any reason to believe that the decision of the court of appeals setting aside the Commission's *Order* has led, or will lead, to any such result given other constraints.

The Commission can and does prohibit broadcasts that are obscene. *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975). Under this power, the Commission can deal with broadcasts such as the example cited by the Commission in its Brief as illustrating the necessity for a broad power to deal with "indecency." (Br. at 28 n.23.) As the Commission alleged in its Apparent Notice of Liability for forfeiture with respect to that broadcast (Petition for Certiorari, Addendum p. 10a), but failed to note in its Brief here, the objectionable material contained in the broadcast would likely be considered obscene under this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973).

Moreover, mindful of their own responsibilities, broadcasters have exercised considerable restraint with respect to programming which the community might view as patently offensive. As the Commission has frequently recognized, the self-regulatory efforts of broadcasters play a substantial role in assuring that a responsible approach is taken in this area.

With respect to children's programming, for example, the Commission has tempered its regulation in deference to its belief in the broadcast industry's "willingness to

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[22] The Commission's *Order* identifies only one instance in which it has finally determined that material broadcast was obscene. *See Order, supra*, 56 F.C.C.2d at 94 (App. 7), citing, *Sonderling Broadcasting Corp.*, 27 R.R.2d 285, *recon. denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975).

regulate itself." [23] Similarly, the Commission has noted with approval the Television Code of the NAB, which since 1952, has encouraged high standards of responsibility in programming.[24] The NAB has a similar code for radio.[25] In addition to the television and radio codes, broadcasters have their own internal policies and practices aimed at dealing with sexually-oriented programming on television.

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[23] *Report and Policy Statement re Children's Programming*, 50 F.C.C.2d 1, 13 (1974), *aff'd sub nom. Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977).

[24] *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 424 (1975). The guidelines of the Television Code provide in part as follows:

"II. Responsibility Toward Children

* * * *

"Because children are allowed to watch programs designed primarily for adults, broadcasters should take this practice into account in the presentation of material in such programs when children may constitute a substantial segment of the audience.

* * * *

"IV. Special Program Standards

* * * *

"8. Obscene, indecent or profane matter, as proscribed by law, is unacceptable.

"9. The presentation of marriage, the family and similar important human relationships, and material with sexual connotations, shall not be treated exploitatively or irresponsibly, but with sensitivity. Costuming and movements of all performers shall be handled in a similar fashion." NAB Television Code.

[25] The Radio Code provides in part as follows:

"I. Program Standards

* * * *

"H. Responsibility Toward Children

* * * *

"7. [Programming] should present such subjects as violence and sex without undue emphasis and only as required by plot development or character delineation." NAB Radio Code.

Another factor which acts to inhibit the broadcast of material which some might find offensive was discussed by the court of appeals in its opinion below. As the court noted, there are strong economic incentives deterring broadcasters from broadcasting excessive quantities of material which some members of the public might find objectionable. The court observed:

> "Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears. Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills. If they are correct, and if the Commission truly seeks only to enforce community standards, the market should limit the filth accordingly." 556 F.2d at 18 (App. 63-64) (footnotes omitted).

These economic constraints also operate on noncommercial broadcasters which depend on family and corporate contributions, as well as tax dollars, for their survival.

As a result of these and other self-regulatory efforts, there has been nothing approaching the widespread use of obscene or "indecent" material feared by the Commission.[26]

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[26] The self-regulatory efforts of broadcasters have been sufficiently effective that they have led to charges of "censorship" by writers and producers. *See, e.g., Writers Guild* v. *FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *appeal pending sub nom. Writers Guild* v. *American Broadcasting Co.*, No. 77-1058 (9th Cir. filed November 15, 1976) (action by various directors, actors, writers, and producers of television programs against television networks, National Association of Broadcasters and the Commission challenging adop-

These regulatory and self-regulatory restraints would exist whether or not the Commission is held to have the power to prohibit the broadcast of material which is not obscene. There is, therefore, little ground for fearing that denial of such power to the Commission would change the nature of the broadcasting industry. Unfortunately, if the Commission's *Order* is ultimately sustained, there is also little question that the Commission's roving efforts to regulate "indecency" will injure broadcast journalism and substantially limit other responsible programming. RTNDA's petition for reconsideration or clarification of the Commission's *Order*, for example, evidences the *Order*'s great potential for suppressing legitimate news and public affairs broadcasts. The Commission's refusal on reconsideration to address the problems for broadcast journalism raised by its *Order* and its requirement that even live news coverage be "sensitiv[e] to the community's . . . tastes" [27] only intensify the concerns under which broadcasters must labor after the Commission's *Order*.

Moreover, the Commission's *Order* will not just ban seven words from the airwaves. In claiming a general power to determine what is "patently offensive" to accepted standards of decency, the Commission has asserted a power generally to act as censor and to bar material that is not obscene and that has considerable literary,

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tion of so-called family viewing policy); *Smothers* v. *Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972) (action by television entertainers against television network alleging abridgement of First Amendment rights resulting from network's alleged decisions to delete programming material which it deemed offensive). The family viewing policy at issue in *Writers Guild* refers to amendments to the NAB Television Code limiting the broadcast of violent and sexually-oriented programming in the early evening hours.

[27] *Reconsideration, supra*, 59 F.C.C.2d at 893 n.1 (App. 43 n.1).

artistic and intellectual merit.[28] This power of censorship is clearly denied to the Commission by the First Amendment and Section 326 of the Communications Act, 47 U.S.C. § 326, and, indeed, is contrary to the whole structure of congressional regulation of broadcasting, for as this Court has noted, "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110 (1973).

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[28] As this Court observed in *Winters* v. *New York*, 333 U.S. 507, 510 (1948): "What is one man's amusement, teaches another's doctrine." It is therefore, not surprising, though perhaps ironic, that George Carlin's monologue, the very subject of this controversy, addresses, albeit in the form of entertainment, issues which underlay this controversy.

I. THE FEDERAL COMMUNICATIONS COMMISSION MAY NOT BAR THE BROADCAST OF MATERIAL WHICH IT DEEMS TO BE INDECENT OR OFFENSIVE UNLESS THE BROADCASTING OF SUCH MATERIAL IS PROHIBITED BY SECTION 1464 OF THE CRIMINAL CODE.

In its *Order*, the Commission suggests that its power to regulate offensive programming derives not only from Section 1464 but also from its obligation under Section 303(g) of the Communications Act, 47 U.S.C. § 303(g), to promote the larger and more effective use of radio in the public interest. *Order*, *supra*, 56 F.C.C.2d at 99 (App. 18). Any contention that Section 303(g) enables the Commission to go beyond Section 1464 is at odds with the Communications Act as construed by this Court, with its legislative history and with constitutional prerequisites for agency regulation under the First Amendment.

A similar question came before this Court in *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). There the Commission ruled that certain "give-away" programs constituted unlawful lotteries under Section 1304 of the Criminal Code. *Id.* at 286-87. In such programs, home listeners, selected wholly or in part on the basis of chance, receive prizes as awards for correctly solving a given problem or answering a question. On review it was argued that listening to the broadcast did not supply the necessary consideration for there to be a lottery, and that the programs were therefore not unlawful under Section 1304.

Although there was no statute specifically authorizing the Commission to enforce Section 1304, the Court noted that the Commission could issue regulations to implement Section 1304 because the " 'public interest, convenience, or necessity' standard for the issuance of licenses would

seem to imply a requirement that the applicant be law-abiding." 347 U.S. at 290 n.7. The Court, however, rejected the notion that the Commission was free to define lotteries and similar schemes independent of the reach of Section 1304, stating:

> "*the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action.* Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a 'lottery, gift enterprise, or similar scheme' proscribed by § 1304." 347 U.S. at 290 (Emphasis added.)

The Court went on to hold that give-away programs were not in violation of Section 1304 and accordingly concluded that the Commission had exceeded its jurisdiction. 347 U.S. at 296.

Here, just as in *American Broadcasting*, the Commission may not reach beyond the prohibitions in the Criminal Code. Indeed this is a far stronger case than *American Broadcasting* for finding such a limitation in the Criminal Code provision. Section 326 of the Communications Act specifically denies the Commission "the power of censorship" and provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. Section 326, when originally enacted as Section 29 of the Radio Act of 1927,[29] was intended to memorialize the congressional belief that nothing in the Radio Act, which included provision for licensing in the public interest, gave

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[29] Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927).

the Commission the power of censorship.[30] The legislative history indicates that Congress clearly viewed the prohibition of particular programs as censorship [31] and believed that the authority conferred in the Act to license in the "public interest" gave "[n]o power at all" to proscribe particular programs.[32] The only exception to the prohibi-

[30] Stephen B. Davis, Jr., Solicitor of the Department of Commerce, who was intimately familiar with the drafting of the Radio Act, stated in Senate hearings on the Act:

> "Frankly, I don't think there is anything in the act which would give the power of censorship. I fully agree that there should be nothing to give the Secretary the power of censorship, and it is perhaps wise to give this formal declaration of that policy. Anyway, that is the purpose of this section." *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926).

[31] For example, in response to a charge that the Senate bill authorized censorship of anything but religious programs, Senator Dill, a principal architect of the legislation, stated during Senate debate that the bill expressly prohibited Commission censorship of any kind of program. 67 Cong. Rec. 12615 (1926).

Similarly, Congressman Scott, leader of the House conferees, defended the bill against complaints that it did not go far enough in regulating broadcasters, saying:

> "Yes; and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567 (1927).

See also Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries, 69th Cong., 1st Sess. 40 (1926) (remarks of Congressman White, co-author of the Radio Act of 1927, noting that provisions prohibiting obscenity had not been included in House bill in order to avoid charges of censorship).

[32] 67 Cong. Rec. 5480 (1926) (remarks by Congressman White, draftsman of the House bill, during House debates). *See also Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 26 (1926). The decision of the district court in *American Broadcasting* held that if Commission provisions went beyond Section 1364, they would "be considered a form of 'censorship.'" *American Broadcasting Co.* v. *United States*, 110 F.Supp. 374, 389 (S.D.N.Y. 1953).

tions of Section 326 was what was then contained in the last sentence of Section 29 [33] and later became part of Section 326 before ultimately becoming Section 1464. Even the Commission concedes that Section 326 is a specific limitation on its authority (*see* Br. at 5, 8) and apparently recognizes that Section 1464 provides the only statutory exception.

Moreover, constitutional considerations strongly disfavor construction of the Communications Act to authorize the Commission to bar "offensive" programs under the so-called "public interest" standard. This Court has established that an administrative agency cannot prohibit speech under a statute which provides no definite standard.[34] Without some adequate statutory standard, there exists the impermissible risk that licensing will become "the instrument of arbitrary suppression." *Hague* v. *CIO*, 307 U.S. 496, 516 (1939).

The "public interest" standard hardly supplies the necessary guidance. The First Amendment requirement of definite standards will not tolerate Commission efforts "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest.'" *Banzhaf* v. *FCC*, 405 F.2d 1082, 1099 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969).[35] It follows that, if the Commission has any

[33] "No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication." Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927).

[34] *See Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1968); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952); *Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[35] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379-85 (1969), which held that the Commission's authority to implement its fairness doctrine derived from Commission authority to license in the public interest, is not to the contrary. In *Red Lion*, there was an extensive background of legislative history indicating congressional

authority to regulate the broadcast of material which is not obscene, that authority must reside in Section 1464.[36]

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ratification of the fairness doctrine. This Court found in *Red Lion* that legislative history "vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard." *Id.* at 380. In *Red Lion*, moreover, the court noted specifically:

> "There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues." *Id.* at 396.

[36] The district court's decision in *American Broadcasting* identifies the constitutional problems presented here if the Commission's authority extends beyond Section 1464. There, with respect to Section 1304, the district court held:

> "[I]n so far as some of [the Commission's] provisions . . . go beyond the scope of Section 1304 . . ., they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment." *American Broadcasting Co.* v. *United States*, 110 F.Supp. 374, 389 (S.D.N.Y. 1953).

II. SECTION 1464 DOES NOT GRANT THE COMMISSION POWER TO REGULATE OFFENSIVE BUT NON-OBSCENE BROADCASTS.

A. "Indecent" and "Obscene" Have the Same Meaning in Section 1464.

Section 1464 of the Criminal Code provides:

> "whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Although the Commission has been given the authority to enforce the prohibitions of Section 1464 by civil sanctions,[37] Section 1464 is, of course, a criminal statute. As such, it must be strictly construed. In this regard, the observations of this Court in *American Broadcasting* are precisely in point:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice." 347 U.S. at 296.

This requirement of strict construction is even more rigid where, as here, the statute impinges on activities protected by the First Amendment. *See Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Winters* v. *New York*, 333 U.S. 507, 517-20 (1948).

Decisions of this Court, which have construed federal statutory provisions similar to Section 1464, have uniformly equated "indecent" and "obscene" in the Criminal Code.

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[37] *See* 47 U.S.C. § 312(a) (license revocation for violation of Section 1464); 47 U.S.C. § 312(b) (orders to cease and desist violation of Section 1464); 47 U.S.C. § 503(b) (monetary forfeiture for violation of Section 1464).

Section 1461 of the Criminal Code[38] prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." As long ago as 1957, this Court in *Roth* v. *United States*, 354 U.S. 476, indicated that "obscene" and "indecent" had the same meaning in Section 1461. Although it was argued in *Roth* that "these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere," the Court rejected the claim that Section 1461 was unconstitutional, holding that "[t]hese words, applied according to the proper standard for judging obscenity . . . give adequate warning of the conduct proscribed . . . ." *Id.* at 491.[39]

Section 1462 of the Criminal Code[40] prohibits the importation of "any obscene, lewd, lascivious, or filthy book, pamphlet, . . . or other material of indecent character." In *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973), this Court suggested that it was "prepared to construe such terms [appearing in Section 1462] as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*, [*supra*, 413 U.S. at 25]."

A similar result was reached in *Hamling* v. *United States*, 418 U.S. 87, 113-14 (1974), which, like *Roth*, involved Section 1461 of the Criminal Code. Relying on the language in *12 200-Ft. Reels*, the Court specifically construed the "generic" terms of Section 1461 to be limited to the constitutionally proscribable material defined in *Miller*. The Court found that " '[w]hile in common usage . . . words [such as "obscene," "lewd," and "indecent"] have different shades of meaning,' " statu-

[38] 18 U.S.C. § 1461.

[39] *Roth* also involved a California statute which, among other things, prohibited the keeping for sale or advertising "obscene or indecent" material.

[40] 18 U.S.C. § 1462.

torily those words reach only material which is obscene for constitutional purposes. *See Hamling* v. *United States*, *supra*, 418 U.S. at 112, quoting with approval, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482-84 (1962) (opinion of Harlan, J.).

The language of Section 1464, like the language of Section 1461 and Section 1462, prohibits certain material by the use of the adjectives "obscene" and "indecent." It is clear, therefore, that that language also should be construed as limited to material which is obscene as defined in *Miller*.

While the Commission in its Brief now concedes that "if [*12 200-Ft. Reels*] is controlling here, Pacifica's argument may be correct," the Commission suggests that *12 200-Ft. Reels* is not controlling because it "never addressed the broadcast context." (Br. at 29.) Since the rationale in *12 200-Ft. Reels* turned on the vagueness of the term "indecent" rather than on the nature of the medium in which the materials involved were presented, the Commission's distinction is one without a difference. The Commission does not demonstrate why "indecent" is not vague when applied to, for example, material which is broadcast rather than material which is read, and it could not do so.[41] It does not matter here that Section 1464 may have "the salutary purpose of protecting children." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 689 (1968). "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id. See also Rabeck* v. *New York*, 391 U.S. 462 (1968). *12 200-Ft. Reels*, therefore, is controlling here, and "obscene" and "indecent" should be viewed identically for purposes of Section 1464.

[41] *See* discussion, pp. 17-18, *supra*, and pp. 33-39, *infra*.

This view is confirmed by the fact that there is nothing in the legislative history of Section 1464 which suggests the terms "indecent" and "obscene" are to be given different meanings. Indeed, to the extent the legislative history sheds any light on the intended scope of Section 1464, it indicates that the section should be construed as making criminal only obscene utterances. The only relevant passages in the legislative history indicate that "obscenity" was the concern of Congress.[42] The history also suggests that what is now Section 1464 was modeled on what is now Section 1461,[43] which had been part of the Criminal Code since 1909, and which was construed in *Roth* and *Hamling* as limited to obscenity. The Commission effectively recognized the limited scope of the present Section 1464 by submitting to Congress in 1976 a legislative proposal which would have repealed Section 1464 and added a new section to the Communications Act clearly defining "indecent" as distinct from "obscene."[44]

The Seventh Circuit has specifically addressed the question whether "obscene" and "indecent" have different meanings in Section 1464 and has concluded that the meanings are the same. *United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977). The Commission's Brief merely makes passing reference to this case in two footnotes and an unexplained citation. (Br. at 7 n.4, 15 n.18, 26). In *Simpson*, however, after the most extensive analysis made by any decision on the question, the court squarely held that the terms "indecent" and "obscene" do not have

[42] *See Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine & Fisheries*, 68th Cong., 1st Sess. 178-79 (1924).

[43] *See Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 40 (1926).

[44] *See* 122 Cong. Rec. S17101 (1976). In a memorandum of law accompanying its legislative proposal, the Commission, on the question whether "obscene" and "indecent" have different meanings in Section 1464, "acknowledge[d] that this is an area of considerable legal uncertainty." *Id.* at S17106.

separate meanings for the purposes of Section 1464. According to the court:

> " '[O]bscene' and 'indecent' in § 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to prurient interest." 561 F.2d at 60.

B. Construing "Indecent" in Section 1464 To Reach Non-Obscene Speech Would Raise Substantial Constitutional Questions.

This Court's decisions in *12 200-Ft. Reels* and *Hamling* highlight a very fundamental reason requiring that "indecent" and "obscene" be construed identically in Section 1464. " '[W]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' "[45] It is beyond dispute that serious constitutional questions would be raised if "obscene" and "indecent" are not construed identically in Section 1464.

1. If the Term "Indecent" in Section 1464 Is Not Limited to Obscenity, Substantial Questions of Unconstitutional Vagueness Would Be Raised.

12 200-Ft. Reels, *Hamling*, and *Roth* clearly imply that if "indecent" is not synonymous with "obscene" for purposes of Section 1464, serious questions of unconstitutional vagueness would be raised. "The general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976). The deci-

[45] *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 368 (1971), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). *See also Kent* v. *Dulles*, *supra*, 357 U.S. at 129-30, construing authority of Secretary of State to issue or withhold passports narrowly in order to avoid being "faced with important constitutional questions."

sions of this Court resolutely establish that where First Amendment interests are implicated, " 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion.' " [46]

As Commissioner Robinson noted in his concurring opinion below, "[t]here is no significant jurisprudence explaining the meaning of [indecent]." *Order*, *supra*, 56 F.C.C.2d at 104 (App. 27). *See also id.* at 97 (App. 14). This is amply demonstrated by the numerous formulations for "indecent" suggested by the Commission in previous cases and in this case.[47]

Thus, there can be no question that, if the Commission is free to construe Section 1464 to go beyond obscenity, the statute leaves the Commission largely free to define

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[46] *Interstate Circuit* v. *Dallas*, *supra*, 390 U.S. at 684, *quoting Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring). "[L]aws must provide explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). *See also Hynes* v. *Mayor and Council of Borough of Oradell*, *supra*, 425 U.S. at 622; *Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. at 92, 97 (1972); *Kent* v. *Dulles*, *supra*, 357 U.S. at 129-30; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952).

"Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed' . . . assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 109 n.5 (citations omitted). The Commission has had before Congress legislative proposals which would have amended Section 1464 to define the term "indecent." 122 Cong. Rec. S17101-S17111 (1976).

[47] The Commission asserts in its Brief that "at the time of the Commission's ruling on the Pacifica complaint, there was a growing body of regulatory caselaw establishing and applying standards of indecency . . . in broadcasting." (Br. at 14.) The Commission fails to note, however, just how contorted this supposed body of law was. *See* discussion, pp. 17-18, *supra*.

for itself what constitutes the material it may prohibit from being broadcast.[48]

The great constitutional difficulties created by determinations of indecency, which necessarily depend upon personal judgments of morality and taste,[49] were perhaps best articulated in Justice Harlan's opinion for the Court in *Cohen* v. *California*, 403 U.S. 15, 25 (1971). There, in discussing prohibitions on "offensive conduct" as applied to the use of one of the seven words prohibited by the Commission's *Order* as "indecent," the Court observed:

> "How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

Whether or not Congress could "cleanse" the airwaves by regulating "indecent" broadcasts under specific and definite standards, a matter not here in issue, it is clear that judgments of indecency, like those of "offensive conduct," are matters about which "governmental officials cannot make principled distinctions." Allowing the Commission to regulate programming under a standard

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[48] A similar lack of guidance in *Interstate Circuit* v. *Dallas*, *supra*, 390 U.S. at 687, was held to invalidate a film classification ordinance whose standard was "sexual promiscuity".

[49] *Id.* at 676.

of indecency would impose substantial burdens, reaching far beyond any possible legitimate governmental interest.[50]

The vagueness of the existing standard in Section 1464 was clearly recognized in the Commission's 1976 legislative proposal to provide a new standard of indecency.[51] The Commission's legal memorandum accompanying the proposal noted that several cases support the proposition "that the term 'indecent' [in Section 1464] . . . is probably unconstitutionally vague and overbroad." [52]

The Commission's *Order* in this case fails to contribute in any way toward clarification of the statutory standard. While the Commission stated that its *Order* was issued "to clarify the standards" for judging "indecent" language,[53] in its *Reconsideration*, it noted that its *Order* "was issued in a specific factual context,[54] and it now argues before this Court that when a different set of facts is confronted, it can then determine "whether the principles announced in the declaratory order should be applied, modified or extended." (Br. at 43.) The Commission has thus repudiated any commitment to act according to set standards.

Moreover, the *Order* introduces other uncertainties. The *Order* suggests that "indecent" speech may be permitted "[w]hen the number of children in the audience is reduced to a minimum" and the speech "has serious literary, artistic, political or scientific value." [55] The *Order*, however, fails even to define "children." [56] Nor does it define the "minimum" permissible number of children in the audience or the relevant "audience"—whether of stations generally or the particular station or of a particular type of station. The vagueness of the *Order* is exacerbated by the Commission's failure to apply it to this case, despite the fact that the Carlin monologue was broadcast during a school day, after lunch hours, during a talk show over a noncommercial FM station whose appeal is such as not likely to attract child listeners. The *Order*, in this regard, merely observes that "children were undoubtedly in the audience." [57] At one point the *Order* suggests that there will be no exception for any broadcast since it states that "when children *may be* in the audience, [indecent language] cannot be redeemed by a claim that it has literary, artistic, political or scientific value." [58]

The *Order* also observes that the monologue was "prerecorded", "deliberately broadcast", and that the words used in it were "repeated over and over." [59] The *Order* then holds that the language "as broadcast" was indecent,[60] raising, but not answering, questions whether fore-

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[50] Moreover, the procedures according to which the Commission may enforce Section 1464 do not guarantee any prompt judicial resolution or review of Commission action with respect to programming it considers impermissibly offensive. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

[51] *See* 122 Cong. Rec. S17101-S17111 (1976).

[52] *Id.* at S17104.

[53] 56 F.C.C.2d at 99 (App. 17)

[54] 59 F.C.C.2d at 893 (App. 43).

[55] 56 F.C.C.2d at 98 (App. 15-16).

[56] As Judge Tamm found below:

"[T]he *Order* is vague in that it fails to define children. Need a nineteen year old and a seven year old be protected from the same offensive language? The Supreme Court has held that in assessing the requisite capacity of individual choice the age of the minor is a significant factor. The *Order* does not even consider age as a factor, much less a significant one." 556 F.2d at 17 (App. 61) (footnote omitted).

[57] 56 F.C.C.2d at 99 (App. 17).

[58] *Id.* at 98 (App. 15). (Emphasis added.)

[59] *Id.* at 99 (App. 17).

[60] *Id.*

knowledge of broadcast content and repetition are part of the Commission's standard.

The Commission's reading of its *Order* in its Brief here only further confuses the picture. The Commission contends, for example, that no amount of "serious, literary, artistic, political or scientific value" may permit the broadcast of the words at issue here "where a substantial number of children are likely to be in the audience without parental supervision." (Br. at 36.) This raises the questions whether material which has social value can be broadcast when the number of children in the audience, although reduced to a minimum, is still "substantial" and whether such material can be broadcast where the number of children in the audience, although substantial, is likely to be supervised by adults.[61]

Further, while in the *Order* the Commission appeared to judge indecency by a national standard, in its Brief the Commission states that standards of indecency should permit parents to prohibit their children from hearing material "patently offensive by [their] community's contemporary standards." (Br. at 45.) It is even unclear, therefore, whether the Commission intends national or local community standards of offensiveness to be applied.

Finally, and perhaps most significantly, the *Order*, even as clarified on reconsideration, fails to provide any significant guidance as to what "indecent" material will be permitted in news and public affairs broadcasts. The Commission offers no guidance whatsoever as to what is

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[61] The Commission's observation is particularly bewildering in view of the fact that the only known child listener to WBAI's broadcast, the complainant's son, was under parental supervision at the time of the broadcast. In addition, there is no support for Commission consideration of the role of parental supervision. Moreover, no data were presented, for example, showing that parents do not generally supervise the viewing and listening of their children. *See* discussion and data, p. 9 & n.7, *supra*.

permissible in prerecorded news and public affairs broadcasts, and does not even make clear what would be permissible in a live broadcast of, for example, a demonstration. The heavy burdens imposed by the Commission's "standard" on broadcast journalism is readily apparent.

It is evident that there are no clearly articulated standards, either in the Commission's *Order* or in the Commission's reading of that *Order* before this Court, by which "indecency" may be determined. Delegating to the Commission the authority to regulate "indecency" in such circumstances grants the Commission "too wide a discretion," and the absence in Section 1464 "'of narrowly drawn, reasonable and definite standards for the [Commission] to follow' . . . is fatal." *Interstate Circuit* v. *Dallas, supra*, 390 U.S. at 690 (citations omitted).

2. *The Prohibition of Offensive Speech in Radio Communications Generally Would Raise the Most Serious Constitutional Questions.*

The Commission's *Order* also raises substantial constitutional questions apart from considerations of vagueness.

a. *Barring Non-Obscene Speech from the Broadcast Medium Cannot Be Justified on Grounds of Spectrum Scarcity.*

Numerous decisions of this Court have now firmly established the proposition that speech may not be prohibited on the ground that it is offensive to members of the community. In *Cohen* v. *California, supra*, this Court specifically held that wearing a jacket displaying a four-letter word in a court house could not be constitutionally prohibited. Similarly, in *Papish* v. *Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court, *per curiam*, invalidated the expulsion of a student for distributing on campus a non-obscene publication assertedly containing "indecent" speech. According to the Court, "the mere dissemination of ideas—no matter how

offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670.[62]

The Commission contends, however, that the suppression here, which would clearly be impermissible in any other medium, is justified by the scarcity of space in the broadcast spectrum, relying on *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). However, the prohibition of Section 1464 is not limited to utterances over commercial radio and television. It extends to all utterances by means of radio communication, including, for example, communications over citizens' band radio, ship-to-shore radio, business radio and radio telephone. *See Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966).[63] Thus, if construed as the Commission urges, Section 1464 would have the effect of criminalizing countless utterances of protected speech whose listening audi-

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[62] *See also, e.g., Spence* v. *Washington*, 418 U.S. 405 (1974); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

[63] The language of Section 1464 derives nearly verbatim from § 29 of the Radio Act of 1927. According to that Act:

> "The expression 'radio communication' or 'radio communications' wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected." Pub. L. No. 632, ch. 169, § 31, 44 Stat. 1173 (1927).

Before being transferred to Title 18 of the United States Code, the Section 29 prohibition on "indecent" and "obscene" broadcasts was carried over to Section 326 of the Communications Act. In that Act, "radio communication" was defined as:

> "the transmission by radio of writing signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(b).

ences at any time are probably less than a handful of individuals engaged in point to point communication. Such an approach appears to have little constitutional justification. But even if Section 1464 could somehow be limited to general purpose broadcasting, the construction urged by the Commission would still raise substantial constitutional questions.

In *Red Lion*, this Court held at most that spectrum scarcity justifies regulations in general purpose broadcasting which seek to assure that broadcasters do not exclude from the air discussion of controversial issues. Indeed, the court was careful to note in *Red Lion:*

> *"There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326;* or of the official government view dominating public broadcasting. *Such questions would raise more serious First Amendment issues."* *Id.* at 396. (Emphasis added.)[64]

Numerous decisions since *Red Lion*, in this Court and in the lower federal courts, have expressed grave reservations even about regulatory approaches which, while not banning speech in the broadcast medium, would substantially burden the broadcast of protected material. Most significantly, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, this Court emphasized that, although broadcasting presents a unique context in which some limited governmental regulation is at times constitutionally proper, the need for such regula-

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[64] In light of *Red Lion's* limited scope, there is no reason for the Court in this case to approach the question of reconciling *Red Lion* with *Columbia Broadcasting System, Inc.* v. *Democratic National Comm., supra*, and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). *See generally* B. Schmidt, FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976).

tion must always be balanced against the importance of permitting broadcasters to make their editorial choices freely.

The Court concluded that "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" could be best served by a system in which editorial choices were left to the broadcaster:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." 412 U.S. at 124-25.[65]

Thus, the Court rejected the idea that the First Amendment and the existing broadcasting system could tolerate

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[65] Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), this Court, in a case involving a right of reply statute for newspapers, observed that:

> "[T]he Florida [right of reply] statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (Footnote omitted.)

a scheme in which the government would determine the permissible content of material broadcast.

Several other cases have emphasized that the editorial role of the broadcaster is safeguarded by the First Amendment.[66] In *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated*, 516 F.2d 1180 (1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 424 U.S. 910 (1976),[67] the court determined that the Commission had impermissibly substituted its judgment for that of a broadcaster in applying the Commission's fairness doctrine to a particular program. Judge Leventhal, writing for the court, expressed the controlling principle that:

> "The First Amendment is broadly staked on the view that our country and our people—rich in diversity of strains and viewpoint—is best served by widest latitude to the press [and] through a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic society." *Id.* at 1132.

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[66] The decision in *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) (without opinion), is not to the contrary. The district court's decision essentially determined that a challenge to enforcement of a statute prohibiting cigarette advertising by electronic communication did not abridge First Amendment protections. Speaking prior to this Court's decisions in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the district court noted that "product advertising is less vigorously protected than other forms of speech" and that the statute "does not prohibit [broadcasters] from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights." 333 F. Supp. at 584. Thus the court appears to have concluded that "Congress has the power to prohibit the advertising of cigarettes in any media." *Id.*

[67] The NBC case, despite having been vacated on other grounds, is often cited as the law of the circuit. *See, e.g., Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

Similarly, in *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001 (D.C. Cir. 1976), the court reversed a Commission determination that a licensee had violated the Commission's personal attack rules[68] and held that the reasons given by the licensee for not providing time were entitled to great deference under the First Amendment.

In *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the court was confronted with the issue of whether the Public Broadcasting Act[69] would constitutionally require public broadcast licensees to meet specified standards of balance and objectivity with respect to individual programs. Fearful of the system of governmental oversight that would be created, the court interpreted the statute to avoid the constitutional problem, stating "[w]e will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise." *Id.* at 297.

Concerns similar to those of the court in *Accuracy in Media* were voiced more recently in *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977). There the Commission had been requested to adopt rules relating to the sponsorship and the commercial content of children's programs. The Commission declined to adopt the proposed rules, noting that it was involved " 'in a sensitive First Amendment area' " and that " 'it is wise to avoid detailed governmental supervision of programming wherever possible'." *Id.* at 465. The court upheld the Commission's decision, observing that the Commission had not erred in concluding that First Amendment considerations "counselled a more cautious approach." *Id.* at 480.

The Commission argues, however, that its *Order* is necessary to prevent "widespread use of indecent words"

[68] 47 C.F.R. §§ 73.123, .300, .598, .679.

[69] 47 U.S.C. § 396(g)(1)(A).

on the public's airwave, which, because of spectrum scarcity, would usurp and thereby destroy the larger and effective use of radio in the public interest.[70] While the Commission's reasoning is not entirely clear, the Commission appears to suggest that if material such as that involved in this case is permitted, the broadcast of "indecent" language will dominate the broadcast spectrum to the exclusion of other material.

The Commission does not suggest, however, that a devotion of broadcast time to programming which some might find offensive has occurred since the reversal of its *Order* below. And prohibition of such broadcasts, no matter what their artistic or intellectual merit, can hardly be justified in the name of spectrum scarcity.[71]

Indeed, it is clear from the decision of the court of appeals below that the use of so-called "indecent" language in the broadcast medium may sometimes serve the public interest, particularly when the use of such material is part of a journalistic report in a news or public affairs broadcast.[72] And as this Court has noted, "indecent" language may play a vital role in the act of communication:

> "[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no re-

[70] Br. at 18 n.19. *See also Order, supra*, 56 F.C.C.2d at 100 (App. 18).

[71] Considerations analogous to spectrum scarcity have justified local regulations accommodating conflicting interests in use of the streets and parks. It is clear, however, that such considerations only permit regulations which are neutral with respect to the content of speech and which do not suppress certain types of speech because of its content. *See, e.g., Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[72] 556 F.2d at 14-15, 16 (App. 55-56, 58-59).

gard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen* v. *California*, *supra*, 403 U.S. at 26.

Thus, while broadcasting, like other media, may "present its own peculiar problems," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952), the scarcity of the broadcast spectrum offers no justification for censorship of speech which might be found "offensive." As this Court has noted:

> "[T]he basic principles of freedom of speech and the press, like the First Amendment's command do not vary. Those principles . . . make freedom of expression the rule." *Id.*

b. *The Commission's Construction of Section 1464 Cannot Be Sustained on the Ground That It Prevents Unconsented Intrusions on Privacy.*

The Commission also suggests that its *Order* may be justified on the basis of considerations concerning the assertedly intrusive nature of radio broadcasting and the need to protect the unconsenting adult from any possibility that he will tune into a broadcast that he might find offensive. Even Judge Leventhal, the dissenting member of the court below, did not suggest that the Commission's *Order* could be justified on this ground.

There is very little support for the view that government may constitutionally protect an individual from intrusions on privacy based on considerations of program content. As this Court has clearly stated, "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975). In

considering the circumstances in which such regulation is permissible, this Court has held that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, *supra*, 403 U.S. at 21.

In only two cases has the Court considered the issue of government suppression of the content of speech based on considerations of privacy. First, in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), the Court upheld a statute permitting individuals to require that their names be removed from mailing lists for materials which they believed to be offensive. There, however, the suppression occurred at the instance of the private individual, not the government. Second, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the Court held that advertising space on a municipal bus did not constitute a public forum and that, therefore, a municipal policy prohibiting the sale of advertising space on its buses to candidates for political office but not others could be partially justified by the government's desire not to impose such material on captive passengers.

No decision of this Court has ever sustained the supression of speech on grounds of a "privacy" interest in situations where the individual may freely choose to reject the material being offered. In such circumstances the intrusion may be abruptly terminated and privacy protected by actions within the individual's control and "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" [73]

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[73] *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 210-11. *See also Spence* v. *Washington*, 418 U.S. 405, 412 (1974).

For example, in *Cohen* v. *California, supra*, this Court made it clear that "the fact that some unwilling 'listeners' in a public building [including women and children] may have been briefly exposed" to Cohen's jacket inscribed with a four-letter word could not justify suppression of speech. 403 U.S. at 22. According to the Court, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense," for "[t]hose in the [building] could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21.

This ability to avoid "offensive" material is uniquely present in the broadcast medium. As this Court noted in *Rowan*, "[a] radio or television viewer may . . . twist the dial to cut off an offensive or boring communication and thus bar its entering his home." 397 U.S. at 737. Similarly, in *Lehman* this Court noted that unlike other intrusive modes of communication, "[t]he radio can be turned off." 418 U.S. at 302.[74]

Plainly the so-called "passive" nature of radio and television listening cannot justify governmental suppression of non-obscene speech.

c. *The Asserted Need To Protect Children Does Not Obviate the Serious Constitutional Issues.*

Ultimately the Commission bottoms the regulation of "indecent" speech on the need to protect children. There are serious doubts, however, as to whether the protection of children, laudible an interest as that may be, entirely

[74] *See also Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting): "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes."

answers the constitutional objections to the restraints imposed by the Commission's *Order*.[75]

(i) The Commission's Construction Impermissibly Denies Protected Material to the Adult Population.

In arguing the need to keep what it believes to be offensive programming from children, the Commission all but totally ignores the rights of the adult population. This Court has clearly established that material may not be denied to the population generally even if its distribution to children could be prohibited. *Butler* v. *Michigan*, 352 U.S. 380 (1957). The broadcast media are no different in this regard.

The Commission, however, contends that the opportunity for supervision with respect to radio and television is considerably less than that possible for movies, books and magazines. (Br. at 34-35.) Nothing in the record supports this observation. Indeed, one study of

[75] Even if the statute could constitutionally be applied to situations in which indecent language was broadcast to an audience consisting largely of children—a situation which was by no means established to exist in this case—Section 1464 could still not stand under this Court's decision in *Cohen* v. *California, supra*. There, the state sought to justify its broad prohibition against offensive conduct as applied to the plaintiff's particular act of wearing an "indecently" worded jacket in a courthouse. The Court, however, held:

> "Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U.S. 229, 236-237, and n.11 (1963). Cf. *Adderly* v. *Florida*, 385 U.S. 39 (1966). No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created." 403 U.S. at 19. (footnote omitted).

child viewing indicates that the majority of viewing by children is supervised by adults.[76]

The asserted need to protect children provides no greater justification for extensive suppression of protected speech with respect to television and radio than it does for other modes of communication. Supervising child viewing and listening provides the same problems presented in attempting to control thousands of forms of printed material and movies available to children through countless sources. Books and magazines, purchased from newsstands, taken from the home, shared among friends, passed around the school yard or otherwise secured, have been and will always be readily available. The likelihood that children will hear protected speech that some find undesirable cannot be eliminated by removing that speech from radio and television any more than it can be eliminated by totally removing it from books, magazines and movies. *Cf. Butler* v. *Michigan, supra.* In this connection, the Court also may take note that the record album from which the Carlin monologue was broadcast is freely available to children, as well as adults, in stores throughout the country.

It is no answer to say that the interests of adults may be satisfied by channeling objectionable programming to late night hours when children are less likely to be in the audience. Restricting broadcasts to those times would have the effect of making them inaccessible to huge segments of the adult population because of either work hours or sleeping habits.[77]

While the Commission here relies on this Court's decision in *Young* v. *American Mini Theatres*, 427 U.S. 50

[76] Analysis done by A. C. Nielsen & Co. in February, 1974. In particular, the study shows that prime-time viewing constitutes 33% of the viewing done by children 2 to 11 years of age. During that time, parents are present with such children 70% of the time.

[77] *See* discussion and data, p. 9 & n.7, *supra.*

(1976),[78] the restraints on protected speech in *Mini Theatres* are not even remotely comparable to the extensive restraints effectively achieved by the Commission's *Order* in this case. In *Mini Theatres* the city ordinance before the Court required 1000 feet of separation between adult theaters and between such theaters and establishmnts such as bars and pool halls. A separation of 500 feet was required between such theaters and residential areas. The resulting restraint on protected expression was found to be minimal[79] and was found to be justified in part by "the city's interest in attempting to preserve the quality of urban life." *Id.* at 71. Mr. Justice Stevens' plurality opinion observed that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35. Mr. Justice Powell in his pivotal concurring opinion similarly noted that there must be "full opportunity for everyone to receive the message." *Id.* at 76.[80]

By contrast, in this case—which does not involve sexually explicit material or land use—basic First Amendment concerns are directly implicated, for the Commission's *Order* specifically forbids the broadcast of protected

[78] (Br. at 28, 46.)

[79] According to Mr. Justice Stevens' plurality opinion:

> "There [was] no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." 427 U.S. at 62.

[80] Like Mr. Justice Stevens, Mr. Justice Powell found "no indication that the application of the . . . Ordinance to adult theatres has the effect of suppressing production of or, to any significant degree, restricting access to adult movies." *Id.* at 77. In addition, Mr. Justice Powell's opinion indicates that the ordinance's concern was limited to the fact that adult theaters tended to cluster, resulting in the erosion of surrounding communities, and did not extend to any alleged effect resulting from the nature of sexually explicit expression per se.

speech. The Commission's *Order* fails clearly to permit "indecent" broadcasts, even when child audiences are minimal, by refusing to apply that exception to the case before it and by stating that "indecent" speech cannot be redeemed by intellectual value "when children *may be* in the audience," thus including each and every broadcast within its ambit.[81] Even if the Commission's *Order* had permitted "indecent" broadcasts when child audiences were minimal, such broadcasts would still, as a practical matter, not be conveniently accessible to the vast majority of viewers and listeners, "greatly restricting" lawful speech and denying a "full opportunity for everyone to receive the message."

The impact which the Commission's *Order* and *Reconsideration* will have on news and public affairs programming particularly highlights these concerns. Under the Commission's construction, audio and visual broadcasts of angry political demonstrations or even strong expressions of views in more structured dialogue would sometimes have to be censored, no matter how important the censored language might be to a proper understanding of the persons, viewpoints and events being reported. As the Court noted in *Cohen* v. *California, supra*, the emotive part of communication, which would be eliminated by such editing, is often as important, if not more important than the cognitive part. The Commission incorrectly concludes, therefore, that prohibiting the airing of certain words will not stifle robust, free debate.[82] "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." [83]

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[81] *Order, supra*, 56 F.C.C.2d at 98 (App. 15). (Emphasis added.)

[82] *Id.* at 99-100 (App. 18).

[83] *Cohen* v. *California, supra*, 403 U.S. at 26

The censorship imposed by the Commission's *Order* would not only be inimical to accurate and insightful news reporting and presentation of public affairs but would also, in the long run, have its greatest impact on broadcasts concerning highly sensitive issues and on the broadcast of news and public affairs involving those persons who, for whatever reason—cultural impoverishment, social disaffection or the evolution of community mores—regularly and publicly use language which might be considered inappropriate for public speech. Undeniably, many such persons are significantly involved in the nation's political and social concerns. Protection for discourse on these concerns is within the core of the First Amendment. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

It will not do to allow news and public affairs broadcasts containing the language proscribed by the Commission during the late night hours. As noted, such a constraint would make listening or viewing impossible or impractical for many persons who rely upon the regularly scheduled radio and television news and public affairs programming broadcast by local stations and the networks in the morning, afternoon or early evening.

Moreover, relegating "sensitive" news reports to late evening hours is impractical because news has an element of timeliness which will often be lost if it must await broadcast at some later time. This problem with the Commission's ruling is not helped by the exception for live news broadcasts purportedly created by the Commission in its *Reconsideration*. News may be timely even if its coverage is not live. Moreover, the Commission's admonition that sanctions may still attach for live broadcasts which lack "sensitivity to the community's . . . tastes" further deters news broadcasts containing possibly "offensive" language.[84]

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[84] 59 F.C.C.2d at 893 n.1 (App. 43 n.1).

(ii) The Commission's Construction Would Unconstitutionally Ban the Broadcast of Protected Material to Children.

Even if it were constitutional to restrict material in the broadcast medium because of the access of children to such material, the Commission's *Order* here surely sweeps too broadly in describing the material that must be purged from the airwaves lest it be heard by children. Just as children cannot be prevented from viewing all forms of nudity, *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 213, so children cannot be prevented from hearing every use of the words involved here, if they can be prevented from hearing such words at all.[85]

The Commission claims in its Brief that the court below incorrectly treated its *Order* "as though it prohibited any TV or radio broadcast which included one of the seven words." (Br. at 41.) That treatment, however, was an indisputably fair and proper reading of the

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[85] Commendable as may be the concern about the influence of television on the young, as Judge Bazelon noted below, the First Amendment and its history strongly caution against justifying regulation of the broadcast media on the basis of their influence:

> "The impact of television and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communications in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship. As Chief Justice Warren once observed, the impact of a particular medium constitutes no basis for subjecting that medium to greater suppression:
>
> > This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.
>
> *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 77 (1969) (Warren, C.J., dissenting)." 556 F.2d at 30 (App. 91) (footnote omitted).

Order which concerned itself with the "language" and "words" used in the monologue.[86]

As the court below found, the *Order*, by banning the use of certain words, without any consideration of literary, artistic, or intellectual content, would preclude the broadcast of many of the great works of literature:

> "The Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*." 556 F.2d at 14 (App. 54).
>
> "In addition, works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift and the Nixon tapes, would not be allowed to air." *Id.* at 17 n.19 (App. 60 n.19).

As we have noted, it would also prevent the presentation of news and public affairs programming.

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[86] In any event, the propriety of this treatment is established by the Commission's own reading of its *Order*. The Commission states in its Brief that the "narrower" issue presented here is whether "the Commission reasonably concluded that certain *words* . . . were indecent 'as broadcast.'" (Br. at 26, emphasis added.) It then asserts that the characteristic of the words "as broadcast" was defined by certain "undisputed factors." (*Id.*) The first factor, according to the Commission, is that "the *words* broadcast depicted sexual and excretory activities and organs in a manner patently offensive . . . ." (*Id.*, emphasis added.)

The remaining factors—"broadcast 'in the early afternoon,'" "prerecorded," "repeated over and over," and "deliberately broadcast"—do little to alter the conclusion that the words per se were "indecent." Since it would also be true in a great many, if not most, instances that the words would be repeated in a deliberate and prerecorded broadcast, these considerations would not significantly alter the *Order's* ban of the seven words.

There is no dispute that the broadcast of material of serious intellectual content and news and public affairs programming is protected by the First Amendment. "[O]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials" to children. *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 213. Those circumstances were not permissibly defined by the Commission's *Order*.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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FOR ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

—v.—

PACIFICA FOUNDATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE CITIZENS COMMUNICATION CENTER, THE FREEDOM TO READ FOUNDATION, P.E.N. AMERICAN CENTER, AND POETS AND WRITERS, INC., *AMICI CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE CITIZENS COMMUNICATION CENTER, THE FREEDOM TO READ FOUNDATION, P.E.N. AMERICAN CENTER, and POETS & WRITERS, INC.,
AMICI CURIAE

INTEREST OF AMICI */

Amici are six organizations whose work depends on the safeguards of freedoms of speech and press secured by the First Amendment and abridged by the Federal Communications Commission in this case.

*/ Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, non-partisan organization of two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution. For over fifty years, the ACLU has sought to preserve and strengthen the First Amendment as a bulwark against all forms of governmental censorship.

The Association of American Publishers, Inc. is the major national association for publishers of general books, textbooks and educational materials in the United States. AAP's more than 325 members include large commercial book publishers and smaller or non-profit publishers, including university presses and scholarly associations and, in the aggregate, publish a majority of all general and educational books produced in the United States. The AAP has traditionally sought to protect First Amendment rights and has opposed censorship and other attempts to limit freedom of communication.

The Citizens Communication Center is a public interest law firm specializing in communications law. CCC represents the rights of listeners before federal agencies and in federal courts.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and set legal precedent for the freedom to read on behalf of all citizens.

P.E.N. American Center, the United States chapter of International P.E.N., is a non-profit association of 1500 leading American poets, playwrights, essayists, editors, novelists and translators. One of P.E.N.'s basic goals is to promote cooperation among men and women of letters in the interest of freedom of expression everywhere. The charter of International P.E.N. affirms that P.E.N. stands for the principle of unhampered transmission of thought within each nation and between all nations, and members pledge themselves to oppose any form of suppression of freedom of expression in the country and community to which they belong.

Poets & Writers, Inc., is a non-profit corporation organized to disseminate information on the literary world to creative writers and to the public, through publications and through financial support of public readings by poets and writers of their creative works.

The interests of amici in fostering the widest diversity of artistic, literary, political, and social expression of which our nation is capable, and in protecting "uninhibited, robust, and wide-open" comment, expression, and dissent, would be critically affected, directly or indirectly, if the Commission's Order is sustained. Contrary to the Commission's view, there is only one First Amendment, and it is applicable to all forms of expression. Amici urge the Court, once again, to deny to the government the power it seeks to protect us from "indecent" language, and to reaffirm that the freedoms of speech and press are inimical to the regime of the censor, in all of its varied forms.

Questions Presented

1. May a licensed radio station be forbidden by the Federal Communications Commission to broadcast any program containing such words as "fuck" and "shit"?

2. Do the "special qualities" of broadcast communication justify government censorship of radio station WBAI's programs?

3. May the constitutional right of minors to receive broadcast communication be limited to programs which the FCC considers decent?

Preliminary Statement

In 1973, George Carlin, the comedian and social satirist, recorded a commentary on attitudes toward language and certain "filthy words" that are an integral part of it. Carlin catalogued and verbally dissected what he prophetically labelled the seven words that "you couldn's say on the public...airwaves.... The ones you definitely couldn't say." Undeniably, the message communicated by the monologue depends upon Carlin's artistic repetition and incantation of the seven words themselves, to illustrate the amusing, inconsistent and hypocritical conventions that apply to our use of the language. Certainly, no "translation" of the monologue not employing the seven words themselves could possibly convey Carlin's insight and ideas about language in as incisive or persuasive a fashion.[1/]

1/ Although it does a gross disservice to Carlin's masterful, satirical presentation for one simply to enumerate the seven words upon which the Commission fixated, the list is as follows: "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit."

In the fall of 1973, WBAI, a listener-supported, non-profit radio staion in New York City known for a political and intellectual format intended for a limited and sophisticated segment of the listening audience, broadcast the Carlin monologue in the context of a general discussion of contemporary attitudes toward language. Mindful that, despite its serious approach toward this significant topic, use of the seven words might offend some listeners, WBAI advised those who might be offended to tune out the monologue segment of the discussion. The broadcast that ensued, however, offended one listener, who registered his complaint with the Federal Communications Commission.

As a result of this single, isolated complaint, the FCC ratified the prophetic Carlin list of seven "unmentionable" words and disciplined WBAI for having broadcast them. Entirely ignoring the serious context and purpose of WBAI's broadcast of the Carlin monologue, and without any in-depth consideration, inter alia, of the sociological, linguistic or educational implications of its ipse dixit ruling, the FCC simply characterized the seven words as per se "obnoxious, gutter language" having as their inevitable effect the "debasing and brutalizing of human

beings." It therefore held that the seven words - and presumably other "indecent" words of a similar character - may never be broadcast, at least when there is a "reasonable risk" that children "may be" in the audience. During the "late evening hours" when the number of children in the audience is "reduced to a minimum," such offensive words may "conceivably" be aired but only with a warning and at the broadcaster's peril since any words used must be found to have "serious literary, artistic, political, or scientific value." And even in the context of live coverage of a news-making event, where broadcast of "indecent" words may be unavoidable and therefore permissible, the FCC suggested that repeated news broadcast of such words may lead to disciplinary action.

Summary of Argument

Today, its order on "indecent" language having been reversed as an "unconstitutional act of censorship" by the Court of Appeals, the Commission asks this Court to sanction its attempt to censor non-obscene words, taken taken out of context, that it considers inappropriate for broadcast. In amici's view, the FCC order would impose an unprecedented form of

censorship, barred by the FCC's own statutory mandate, and entirely unconnected to the kind of grave or imminent danger of harmful conduct over which any organ of the state could purport to have jurisdiction. This arrogation by the FCC of censorial power over "offensive" language would deprive a substantial portion of the adult population of the United States of an opportunity to hear broadcasts of serious, non-obscene materials of undeniable intellectual, cultural or legitimate entertainment value. The FCC order would prevent broadcasters, who are in any event bound to use their license in the public interest, from exercising their already limited discretion freely to determine the content of their broadcasts. And, despite the FCC's cavalier assumption that it is capable of standing in loco parentis with regard to material that may be broadcast to children, the FCC order wholly fails to recognize that it would also deprive children of a significant range of materials considered appropriate and worthwhile for their education or entertainment, and of their constitutional right to receive ideas via radio.

To the extent the FCC has purported to fit its order within the category of unprotected "obscenity," by reformulating the

standards of Miller v. California, 413 U.S. 15 (1973), to give meaning to the prohibition in 18 U.S.C. 1464 of "indecent" language, its ruling conforms neither procedurally nor substantively to any "obscenity" standard ever adopted by this Court. Indeed, the FCC, in its proscription of words that "depict sexual and excretory activities in a manner patently offensive by contemporary community standards for the broadcast medium," has cut itself entirely free from the moorings of this Court's strictly circumscribed definition of the permissible reach of obscenity laws or regulations.

Thus, this Court's view of the constitutional law of obscenity - as an exception to the literal command of the First Amendment - rests upon the premise that obscenity is expression devoid of social value. Yet the FCC order purports to censor words without regard to social value. Although the law of obscenity as defined by this Court has always been concerned with the depraved or titillating appeal to "prurient interest," the FCC ban holds prurience to be entirely unnecessary to justify the censorship it deems appropriate with

regard to expression broadcast over media it licenses or regulates. Finally, although the American constitutional law of obscenity since Roth - and indeed dating back to the Ulysses case and beyond - has definitively rejected the "Hicklin" rule and has held that obscenity can be determined based only on the "predominant appeal" of the work "taken as a whole," the FCC order permits censorship of single words wholly out of context, regardless of the nature of the entire work.

Set adrift from every one of constitutional standards for determining what is obscene, the first FCC application of its new law of offensive broadcast expression has yielded the following results:

- The FCC seeks to protect unsupervised minors from material broadcast during an hour when the number of children in the audience is at a minimum and in a listening situation - an automobile - where children are by definition under the control of an adult.

- The FCC purports to be concerned with the "thrusting" of unwanted materials in a situation where the licensee gave a warning prior to the broadcast and, in any event,

where a dial-twister, unwittingly tuning in on the broadcast, could avoid further messages by a further twist of the dial, a negligible burden on the few persons who wished not to hear the message in order to protect the constitutional rights of those who with to hear the message.

- The FCC purports to censor in order to further the "larger and more effective use of radio in the public interest," yet an extensive body of highly significant literature, drama, poetry and prose intended for adults and for children which portrays the reality of the human experience, but which may contain what the FCC views as offensive words, is either banned or relegated to hours when a majority of the public is no longer in the radio (or television) audience.

These results are wholly at odds with the First Amendment jurisprudence of this Court and with the basic premises of a free society.

The FCC Order also infringes the distinct constitutional rights of minors to be free of unconstitutional censorship of messages they might wish to receive.

Finally, the Commission's actions, in imposing a prior restraint on the broadcast of "indecent" words with none of the safeguards afforded by a criminal proceeding, are without express statutory authorization and conflict with the express Congressional ban on censorship of radio.

ARGUMENT

I.

CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH AND PRESS DO NOT PERMIT THE FCC TO CENSOR BROADCASTING SOLELY ON THE BASIS OF THE USE OF CERTAIN WORDS TAKEN OUT OF CONTEXT.

The FCC's attempt to ban the use of seven words in George Carlin's satiric monologue is wholly at odds with this Court's First Amendment teachings. The FCC contends that its ban on "indecent" language was a limited ad hoc ruling which assertedly did not justify the broader ruling of the Court below. See, e.g., Pet. Br., 41. On the contrary, as we will first show, the FCC's order is the functional equivalent of a systematic prohibition, and required the overbreadth and vagueness scrutiny applied by the majority below.

A. The Order was Intended to Establish Broad, Nationwide, Standards for the Broadcast of "Indecent" Language.

In an attempt to rescue an ill-conceived and unprecedented Order that on its face bans Shakespeare, the Bible, and dozens of other works of undisputed serious literary and

artistic value from broadcast during most, if not all, of the broadcast day in many communities, the Commission complains that its Order "should have been reviewed as a ruling on a specific set of facts," Pet. Br., 41, and not as a broad standard governing indecent language generally applicable to the broadcast medium. However, the Commission did not confine itself to the facts before it, or rule on the Carlin monologue "as broadcast." And even if it had intended to do so, the nature of the Commission's ruling would inevitably chill protected expression. The Order should be reviewed not only as an instance of unconstitutional and statutorily unauthorized censorship of a particular message of serious literary, artistic and political value, but also as a prospective standard that will predictably affect the broadcast of protected speech and the unfettered exercise of broadcasting judgment, responsibility, and sensitivity to the needs, interests and tastes of differing listening audiences.

At the outset of the Order, the Commission referred to "an increasing number of complaints concerning the use of indecent

language on the public's airwaves," and stated:

> In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of "indecent" language. Pet. App. B, 63, 64.

Emphasizing the in terrorem effect intended, the Commission set forth a general definition of "indecent" language, and concluded by justifying the broad standard embodied in the Order:

> The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. Pet. App. B, 74.

The Commission's belated effort to narrow the intended scope of its Order is inconsistent not only with the very language and scope of the Order, but also with the Commission's own approach. "In essence," the Commission

states, it has held only "that the complainant in this case was entitled to assistance." Pet. Br., at 45. But the Commission's arguments, resting on the peril of "indecent" language to unsupervised children, are inapposite to the facts of the case before it. The sole complainant was driving in a car, and presumably he was fully capable of supervising his child's listening. It is not clear why "the complainant was entitled to assistance from the Commission," when he presumably ignored WBAI's full warning as to the nature of the Carlin monologue that followed, or failed immediately to change the station once made aware of the nature of the broadcast.

Consistent with its expansive, standard-setting approach, in an Order now described as "ad hoc" (Pet. Brief at 42), the Commission failed to give any consideration to, and had no evidence before it of, factors unique to the case before it, such as the nature of the audience served by WBAI; whether the broadcast words were patently offensive to the audience served by WBAI;[2/] or whether, at

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[2/] Cf. Miller v. California, 413 U.S. 15, 30-34 (1973); Hamling v. United States, 418 U.S. 87, 103-105 (1974).

2 p.m. on a weekday the number of unsupervised children in WBAI's audience was at a minimum. [3/] Indeed, so far as the record before the Commission indicated, there were no unsupervised children exposed to the broadcast of the Carlin monologue on an FM program whose subject was "contemporary society's attitudes toward language," plainly not a topic aimed at or attractive to children.

In short, the Commission's Order was in no significant way limited to the Carlin monologue "as broadcast."

B. The "Indecent" Words Suppressed by the Commission are Not Within any of the few Categories of "Unprotected" Speech.

The communication sought to be suppressed here does not fall within any of the increasingly few categories of "unprotected" speech identified by this Court.

3/ Such evidence as is available tends to indicate that the number of children in the audience at 2 p.m. on weekdays is at a minimum, excluding the midnight-6 a.m. time period. See Brief for Amici Curiae American Broadcasting Companies, et al., p. _____, n. 7.

First, we are not dealing here with "hard-core" pornography. The Commission makes no attempt to justify its Order as a regulation of obscene speech. Nor could it. From Roth v. United States, 354 U.S. 476 (1957), through Miller v. California, 413 U.S. 15 (1973), the Court has justified its acceptance of the regulation of obscenity as outside the pale of First Amendment protection on the theory that obscenity is devoid of social value, and the Court has limited the area of permissible regulation to communications that blatantly and exclusively appeal to prurient interest. Indeed. in Miller, this Court stressed that the regulation of obscenity was permissible only because it would be so limited. Here, neither precondition for regulation exists. Rather, we have a good faith broadcast of a satirical monologue about language, presented as a serious literary and artistic offering, and appealing not at all to a prurient interest in sexual matters.

Recognizing this flaw in its argument, the Commission and the dissent below attempt to bridge the doctrinal gap by equating the regulation of what is "indecent" with this Court's decisions permitting the regulation

of what is "obscene." But precisely because the Miller theory is limited to the regulation of hard-core pornography - and the claimed social harm thought to justify its prohibition - the regulation of "indecent" speech cannot be justified as the "functional equivalent" of the Miller doctrine. Cohen v. California, 403 U.S. 15 (1971), makes clear that the asserted equivalence is doctrinal sleight-of-hand.

Similarly, Cohen also makes clear that the speech here can in no way come within the limited exception to First Amendment protection that has been recognized where "fighting words" have been uttered in a manner calculated to incite a breach of the peace. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The "fighting words" doctrine has been limited to direct, individual face-to-face confrontations, and, even then, has never been thought to justify prior restraint. The Commission's Order violates both limitations on the doctrine.

Accordingly, since the speech at issue here cannot be suppressed for any categorical reasons, traditional First Amendment analyses and factors must be brought into play. Judged by such criteria, the Order cannot stand.

C. The Standards Applied by the Commission are Wholly Inconsistent with Settled First Amendment Law.

The Order conflicts with settled First Amendment rules in several critical respects: (1) it uses a broad and limitless "offensiveness" standard to justify suppression of speech; (2) it purports to transpose standards and concepts from the area of obscenity regulation without any of the substantive and procedural preconditions and safeguards required for regulation of obscene material; and (3) by suppressing materials to minors, the Order denies to adults reasonable access to protected communication.

1. Offensiveness

Otherwise protected speech cannot be regulated merely because it is "offensive" to others. Carey v. Population Services International, 431 U.S. 678, 52 L.Ed.2d 675, 695 (1977) (text accompanying n. 27); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,425 U.S. 748 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-212 (1975); Cohen v. California, 403 U.S. 15 (1971). Last term, rebuffing New York's attempt to suppress as

to minors advertisements for contraceptive products allegedly "offensive and embarrassing to those exposed to them," the Court, in a section of the opinion reflecting the views of six Justices, observed:

> But these [qualities] are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. See, e.g., Cohen v. California, 403 U.S. 15 (1971).

Carey v. Population Services International, supra, 52 L.Ed.2d at 695. In Erznoznik, the Court also emphasized this principle, citing Mr. Justice Harlan's holding in Cohen that governmental power to suppress speech claimed to offend others was "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." Erznoznik, 422 U.S. at 210, citing Cohen v. California, 403 U.S. at 21 (emphasis added).

Even if such a showing could override First Amendment interests, which amici do not concede, the Commission did not consider how intolerable were the

invasions of the privacy interests supporting its Order. It had no evidence as to how "offensive" the monologue was, to how many people, and in which listening audience. The only evidence that the message was "offensive" to any audience was a single letter of complaint.

Nor can the Order be justified on the ground that it simply "channeled" "offensive" speech, but did not "suppress" it within the meaning of Carey and Cohen. As Justice Powell's pivotal concurrence in Young v. American Mini Theaters makes plain, regulation can be upheld as "channeling," if at all, only so long as it does not cause

> a significant overall curtailment of [the message]...or the opportunity to reach an audience.
> 427 U.S. 50, 78-79 (1976).

"The primary concern of the free speech guarantee," Justice Powell wrote, "is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message." 427 U.S. at 76 (citations omitted).

In Young, this Court found that a geographic dispersion of adult movie theaters led at most to minor inconvenience, and that

the zoning regulation at issue was "unrelated to the suppression of free expression," the Court finding minimal and incidental effect on First Amendment freedoms. Here, as the Court of Appeals found, the Commission's euphemistically-labelled "channeling" is suppression, pure and simple. By permitting works containing the proscribed words only at late night hours, if at all, the Commission ensures that there will not be "full opportunity for everyone to receive the message," Young, supra, 427 U.S. at 78-79 (Powell, J., concurring). As Judge Bazelon's concurrence observed, "Adults with normal sleeping habits will be limited to programs 'fit for children.'" Pet. App. A, 36. The Order would violate the "paramount" rights of listeners, "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 390 (1969).

2. Prurient Appeal

The Commission's indecency standard attempts to piggy-back on this Court's specific standards for the regulation of obscenity, set forth in Miller v. California,

413 U.S. 15 (1973), and its progeny. But where Miller embodied a three-part test to limit the application of state obscenity regulation to non-protected speech, the Commission has entirely disregarded two-thirds of that test (prurient appeal, serious value as a whole), and improperly applied the third part (patent offensiveness as a whole) directly to protected speech.

3. Context

The Court has insisted that governmental attempts to regulate speech look not to isolated words or passages, but to the entire work, to the context in which the words to be regulated appear. Compare, Regina v. Hicklin, L.R. 3.Q.B. 360 [1868], with United States v. Levine, 83 F.2d 156 (2d Cir. 1936) (L. Hand, J.); Roth v. United States, 354 U.S. at 489; Miller v. California, 413 U.S. at 24. The Order's creation of an index of forbidden words flouts this settled principle. By announcing that language will be deemed indecent even if it has "literary, artistic, political, or scientific value," Pet. App. 12, 71, the Commission attempts to reverse nearly fifty years of First Amendment jurisprudence. The Court rejected the Regina v.

Hicklin, test in Roth because it involved a substantial risk of restriction of language which was in fact protected by the constitutional guarantees of freedom of speech and freedom of press. See, F. Schauer, The Law of Obscenity 37 (1976). The Commission's resurrection of the Hicklin approach would produce the very evils that led to its demise. But this Court has repeatedly made it clear that, where the work as a whole is not obscene, particular words or pictures therein are entitled to full protection if they are "relevant to the theme" of the material and "rationally related" to it. Kois v. Wisconsin, 408 U.S. 229, 231-32 (1972).

The Commission cited no authorities, relied on no evidence, and gave no reasons to support its conclusion that indecent words standing alone, and regardless of context, are patently offensive or harmful in any way to minors. In direct opposition to that sort of all-encompassing approach, this Court in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), concluded that all nudity, regardless of context, "cannot be deemed obscene even to minors." How then can the Commission declare these seven words, regardless of context, and regardless of the likely audience

of the licensee, to be unprotected by the First Amendment because young people may be in the radio audience?

The Commission has assumed, without holding any hearings or consulting any surveys, that most parents would not want their children to hear these seven words, no matter in what context they appeared. It did not consider that there are childrens' books which use some of these words and yet have won awards; or that books with such words have been recommended for young people by recognized authorities. [4/] Although the Court has stated that "in relatively narrow and well-defined circumstances," government may restrict minors' First Amendment rights, Erznoznik, supra at 213, it has also repeatedly emphasized that even with respect to regulations aimed at young people, "when a state...burdens the exercise of a fundamental right, its attempt to justify that burden...requires more than a bare assertion, based on a conceded complete absence of supporting evidence that the burden is connected to such a policy," Carey v. Population Services International, 431 U.S. 678, 696 (1977). And it has more than once insisted

4/ See Appendix.

that an "undifferentiated fear...is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969); Cohen v. California, supra at 23.

4. The Impact of the Indecency Standards on Adults

Even if the Order could be justified as to minors, but see Part III, infra, it is unconstitutional because it has a drastic impact on the availability of concededly protected material to adults. The Commission failed to examine the impact of its order on adults, although it has been clear since Butler v. Michigan, 352 U.S. 380 (1957), that objectionable materials could not be kept from adults because of their potential or supposed effect on minors. That, of course, is the precise effect engineered by the Commission's Order.

The Commission apparently did not consider regulation narrowly limited to obscenity in programming especially aimed at children, even if such a distinction were constitutionally permissible. In the

absence of record support for the unlikely assumption that its Order was the least restrictive regulation that would have served its purposes, the Order plainly falls within the proscription of Butler. See also Erznoznik v. City of Jacksonville, supra.

II.

RADIO'S "SPECIAL QUALITIES" DO NOT JUSTIFY GOVERNMENT CENSORSHIP OF A RADIO STATION'S PROGRAM.

The FCC declaratory order is an act of censorship. Its specific purpose and effect is to prevent radio station WBAI from broadcasting the condemned Carlin material, or any program containing the condemned words, in the future; its general purpose and effect is to prevent all radio and television stations from disseminating programs with ideas communicated by particular "indecent" words. This Court has recognized that forbidding the public expression of particular words risks "suppressing ideas in the process." Cohen v. California, 403 U.S. 15, 26 (1971).

In Cohen, a person had been convicted of "offensive conduct" for appearing in a courthouse corridor, where "there were women and children present," 403 U.S. at 16 (emphasis added), wearing a jacket bearing the

plainly visible words "fuck the draft." The Court reversed Cohen's conviction, holding that the attempted suppression of the message communicated by those words violated freedom of expression, notwithstanding the facially "indecent," or "offensive," character of the language involved. Like "much linguistic expression, [the word] served a dual communicative function;" it conveyed "not only ideas capable of relatively precise detached explication, but otherwise inexpressible emotions as well." As Mr. Justice Harlan's sensitive opinion for the Court pointed out, the Constitution protects the "emotive function," as well as the "cognitive content," of language. Cohen v. California, supra at 26. It was held impermissible for government to seek to "remove this offensive word from the public vocabulary."

Even in situations where such "indecent" language has been used by persons to express emotive insults arguably empty of cognitive content, this Court has held them to be protected. See, Gooding v. Wilson, 405 U.S. 518 (1972) ("You son of a bitch"), Rosenfield v. New Jersey, 408 U.S. 901 (1972) ("Mother fucker"), Lewis v. New Orleans, 408 U.S. 913 (1972) ("goddam mother fuckin' police"),

Brown v. Oklahoma, 408 U.S. 914 (1972) ("Mother fucking fascist pig cops"), Eaton v. City of Tulsa, 415 U.S. 697 (1974) ("chickenshit"), and Papish v. University of Missouri Curators, 410 U.S. 667 (1973) ("Motherfucker Acquitted").

Significantly, the FCC did not dispute WBAI's claim that the "indecent" words used by Carlin, and aired by the station, were "natural and contributed to the discussion and understanding" of society's attitudes toward language (Pet. App. B, 65-66). It viewed such language as "garbage" however broadcast, and banned "indecent" words from daytime or evening broadcasting regardless of their cognitive content, emotive function, or social significance. The Commission must have recognized that its declaratory order, proscribing the broadcast of the interdicted language, effectively would eliminate not only the Carlin monologue, but many other comic and dramatic words from the air. 5/

The Commission defended its action on the ground that radio has "unique qualities," and "its own peculiar problems," which

5/ See Appendix. See also the Opinion of Judge Tamm below, Pet. App. A. 15.

justify such regulation and permit "special treatment." The Commission identified four qualities of radio to justify its Order: (1) many children have unsupervised access to radios; (2) radio receivers are in the home where people's privacy interest deserves extra deference; (3) persons may unwittingly "tune in" a station without knowledge that offensive language is being, or will be, broadcast; (4) the government must apportion the scarce broadcast spectrum space "in the public interest." As we show below, none of these attributes of radio speech requires or justifies FCC censorship.

1. Unsupervised Listening by Children

The FCC states: "Obnoxious gutter language has the effect of debasing and brutalizing human beings," and "such words have no place on radio when children are in the audience" (Pet. App. B., 71), and "children have access to radios and in many cases are unsupervised by parents." (Pet. for Cert., 11). But the fact that children have supervised or unsupervised access to radios does not mean that the FCC may, constitutionally, superintend that access. First, under

Ginsberg v. New York, 390 U.S. 629 (1968), the monologue is not obscene as to minors - and accordingly is entitled to First Amendment protection - because, inter alia, it does not appeal to the prurient interest of minors. See generally Part III infra.

But even assuming, arguendo, that Congress has power constitutionally to curtail the freedom of minor persons to express or receive non-obscene information and ideas, Congress has never authorized the Commission to undertake such curtailment. Congress has not sought to place the Commission in loco parentis with regard to the radio programs to which children may listen. And if, as the Commissions claims, "broadcasters have a special responsibility to children," (Pet. Brief, 26), that responsibility, under the Communications Act, and the Constitution, is to be carried out by the broadcasters themselves, and not by the FCC.

Broadcasting is not the only type of communication to which minor persons have access in some degree unsupervised by parents or government officials. Minors have similar access to phonograph records, plays, movies, newspapers and magazines, libraries, book-

stores, museums, and galleries. Access to messages in each of these media is relatively inexpensive and well within the financial reach of most minors. Nor is radio different from other media in terms of adult control of juvenile access. The persons in charge of the mentioned media may, or may not, seek to limit the access of minor persons to messages offered. Even where legislatures have sought to limit the access of minors to communicative material, this Court has required that the obligation be arranged through measures which respect the rights to freedom of expression of the children and adults affected, adhere to constitutional requirements of "narrowly drawn, reasonable and definitive standards" for the officials to follow, and avoid any censorship of content. Butler v. Michigan, 352 U.S. 380 (1957); Ginsberg v. New York, 390 U.S. 629 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

2. The Privacy of Home Radio

Broadcast communication is said by the Commission to be unique, and to warrant government censorship of serious programs such as "Lunchpail," because it is inherently "intrusive" to the home. But radio is not

intrusive in a constitutionally meaningful sense. It is unlike, for example, both loudspeakers in public mass transit vehicles, see Public Utilities Commission v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting), and "loud and raucous" sound trucks, see Kovacs v. Cooper, 336 U.S. 77 (1949). See also Martin v. City of Struthers, 319 U.S. 141 (1943). There was practically "no escape" from the media in Kovacs and Pollak. But there is a simple escape from radio and television: "The radio can be turned off...." Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (Brandeis, J.).

The government relies heavily on Rowan v. United States Post Office Department, 397 U.S. 728 (1970), where this Court upheld a federal law empowering householders, not government officials, to prohibit unwanted mail from entering the home. The Court there said: "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee," and that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail." 397 U.S. 736-37. But these propositions support WBAI's, not the FCC's, position. As the Chief Justice's opinion pointed out, Congress, in giving householders

the power to exclude unwanted mail messages, sought to avoid constitutional questions which would have arisen had Congress vested "the power to make any discretionary evaluation of the material in a governmental official." Id. at 737. Compare Blount v. Rizzi, 400 U.S. 410 (1971), where the Court applied the full panoply of procedural First Amendment protections in striking down governmentally compelled exclusion of mail messages to householders. To cede to the FCC the power it seeks to exclude from the air programs containing indecent language would place in the hands of government officials effective power to make discretionary evaluation of the program material which will be received into the home. Listeners have no real choice where the government, having already "cleaned up" the airwaves, leaves them no alternatives to choose from. Here, again, Mr. Justice Harlan foresaw the danger in Cohen: "[W]hile the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." 403 U.S. at 25.

3. The Dial-Turning Problem

According to the FCC, radio is unique because people may unwittingly tune in offensive material or an unwanted station. "Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact [is] that by its very nature thousands of others not within the 'intended' audience may also see or hear portions of the broadcast.... While many have loyalty to a particular station or stations, many others engage in the electronic smorgasbord sampling." (Pet. App. B., 68, 69). But a person may also unwittingly spot a story or a photograph in a daily newspaper, or weekly magazine, that they may consider indecent, upsetting, offensive, or revolting. Children as well as adults may unwittingly encounter unwanted images of human nudity flashed on drive-in motion-picture screens, visible from the streets and other public areas. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). So, too, live and motion picture theaters regularly entertain children as well as adults who unwittingly see images, and unwittingly hear words they would prefer not to see or hear, including the "indecent"

words proscribed by the Order. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Under the Commission's Order, the program messages of stations, such as WBAI, that appeal to persons with tastes and interests not shared by most persons would be eliminated from the broadcast spectrum to protect the dial-turning mass audiences. 6/ A chance, brief exposure to an unwanted communication is a small and necessary price for listeners to pay in order for society to enjoy freedom and diversity in broadcasting.

4. Scarce Airwaves

The scarcity of spectrum space does not support the government's claim that broadcasting is uniquely subject to governmental censorship. WBAI is a non-commercial, non-profit station. Its program choices, including "Lunchpail," are listener-supported. It is one of the few non-commercial, listener-supported stations licensed to serve the audience interested in creative, provocative,

6/ It is commonplace, and worth noting, that the broadcast media show far less political and artistic diversity than do the print media.

and innovative broadcast programs. The public interest in radio broadcasting which the FCC is instructed to oversee is disserved by the Order, which tends to eliminate from the airwaves programs that serve the public interest precisely because they are not bland and inoffensive. As the FCC itself testified, in granting WBAI's license renewal applications in 1964: "We recognize that provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland could gain access to the radio microphone or TV camera." Pet. Br., at 9.

III.

MINORS HAVE A CONSTITUTIONAL RIGHT TO LISTEN TO RADIO FREE OF FCC CENSORSHIP.

In Tinker v. Des Moines Independent Community School District, supra, this Court recognized that minors are "persons" under the Constitution, and "possessed of fundamental rights which the State must respect." 393 U.S. at 511. See also West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In the absence of "a specific showing of constitutionally valid reasons to regulate their speech," children are entitled, like adults, to freedom of expression. Tinker supra, 393 U.S. at 511. Although this Court has suggested in Prince v. Massachusetts, 321 U.S. 158 (1944), that "[t]he state's authority over children's activities is broader than over like actions of adults," the regulation upheld there concerned child employment, not the access of minors to the media. Moreover, in holding that children could be protected from serious documented dangers, the Court emphasized that they ought not be protected from their own development as adults. "A democratic society rests, for its continuance,

upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince v. Massachusetts, 321 U.S. at 168.

Increasingly, this Court has come to protect the rights of minors in both civil and criminal contexts. See Goss v. Lopez, 419 U.S. 565 (1975); Breed v. Jones, 421 U.S. 519 (1975); In re Gault, 387 U.S. 1 (1967). And, in Carey v. Population Services International, 431 U.S. 678 (1977), the Court held that minors have constitutional rights of privacy and expression precluding the government from suppressing their access to information about contraceptives, and from conditioning their access to contraceptives upon parental consent, much as their right to terminate pregnancies could not be conditioned on such consent. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976). This Court should guard against the facile assumption, characteristic of paternalistic abrogation of rights, that minor persons are incapable of regulating their own access to images and ideas. Even if it be assumed, arguendo, with the concurring opinion of Mr. Justice Stewart in Ginsberg v. New York, 390 U.S. at 649-50,

that "at least in some precisely defined areas, a child - like someone in a captive audience - is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," the attempted censorship of "indecent" or "inappropriate" radio and television programs by the FCC, is not such a "precisely defined area." 7/

Three reasons support this argument.

First, the monologue that the FCC here "held" indecent and unfit for minors is freely available to them at phonograph record stores throughout the nation. Nor is this the only popular work containing the proscribed words to which children have access. See Appendix. The words deemed by the FCC to be unsuitable for young persons are words with which most young persons are familiar. They are part of the country's common linguistic culture - as the transcribed version of the Carlin record itself plainly demonstrates. Pet. App. B. 74. To deny young persons access to the messages

7/ A study made for the President's Commission on Obscenity and Pornography indicated that four of five adolescents were familiar with such words. See Vol. IX, Technical Report, at pages 273-311 ("Exposure of Adolescents To Erotic Materials").

which "indecent" words communicate in our culture, and its many and diverse subcultures - because they are "indecent," i.e., taboo - is to deny young persons that access to our culture which they presumably require to become adult persons. Where the denial is a denial of access to words and messages, it amounts also to a denial of First Amendment rights, for freedom of speech includes the right to receive ideas. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Martin v. City of Struthers, 319 U.S. 141 (1943); Lamont v. Postmaster General, 381 U.S. 301 (1965); Bigelow v. Virginia, 421 U.S. 809 (1975).

Second, although the Court has held that government may "adjust the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests... of such minors," Ginsberg v. New York, 390 U.S. 629, 638 (1968), a finding of obscenity is still required to justify suppression of speech as to minors. As a leading commentator has noted in summarizing the Court's juvenile obscenity cases:

> if material does not meet each of the three tests, it may not be prohibited, even for minors...

> Unless a film or publication has prurient interest to minors, is patently offensive when distributed to minors, and lacks serious literary, artistic, scientific, or political value for minors, it is still protected by the First Amendment. Thus, Ginsberg does not allow the definition of obscenity, even for minors, to include standard art objects, great literature, or mere nudity in any context.

F. Schauer, The Law of Obscenity, 89 (1976). The Commission's indecency standard makes no reference to the prurient appeal of the monologue to minors. Indeed, there was no prurient appeal, as the Commission concedes. Pet. App. B, 71. Accordingly, it is plain, even under the variable obscenity test of Ginsberg, that the monologue was protected as to minors.

Third, even if government has greater power to regulate commercial speech directed at children than other protected speech directed at children, see Carey v. Population Services International, supra, 52 L.Ed. at 702, n. 6 (Powell, J., concurring), the monologue was not directed at children, and it is in no sense commercial speech or advertising.

To the contrary, the monologue was broadcast on a non-profit, listener-supported station as part of a serious discussion, and it is entitled to full First Amendment protections.

Finally, amici submit that any assumption that speech otherwise protected as to minors loses some of that protection because it is disseminated on the electronic media must be rejected. The special treatment of broadcasting in the Court's decisions has been based solely on a condition of scarcity, and not at all on any presumed special communicative effect. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 387-401 (1969). Cf. Kovacs v. Cooper, 336 U.S. 77 (1949).

IV.

THE FCC DOES NOT HAVE STATUTORY AUTHORITY FOR THE ACTIONS TAKEN IN THIS CASE.

Congress has expressly witheld from the FCC "the power of censorship" and has expressly prohibited the FCC from interfering "with the right of free speech by means of radio communication." 47 U.S.C. §326.

Despite the express denial of authority to censor, the FCC claims it has authority to censor pursuant to 18 U.S.C. §1464, which authorizes criminal prosecution for the utterance of any "obscene, indecent, or profane language by means of radio communication."

There is a substantial difference, as Congress recognized, between administrative censorship, which is a prior restraint, and subsequent criminal punishment, with all of its constitutional safeguards. In fact, §§ 1464 and 326 were initially enacted as part of the same statute (38 Stat. 1091, June 19, 1934, c. 652; see Pet. Brief, p. 5). It is true that Congress has given the FCC the authority to "revoke any station's license...for violation of section...1464" (47 U.S.C. §312(a)(6), but the FCC has not taken such action in this case. It is also true that Congress has given the FCC the authority to issue a "cease and desist" order to any person who "has violated or failed to observe...section...1464" (47 U.S.C. §312(b)(6)), but the FCC has not taken that action in this case either.

In short, the "declaratory order" issued by the FCC is not authorized by §312, and is

in excess of the FCC's statutory authority under §312. Instead, the FCC relies on its general authority under 47 U.S.C. §303(g) to "encourage the larger and more effective use of radio in the public interest." But that general authority does not mention or refer to §1464, as does the more specific authority of §312. The general authority conferred by §303 is expressly limited by the first section of §303: "Except as otherwise provided in this chapter...." The FCC's claimed general authority under §303(g) to rely upon §1464 conflicts with the more specific authority covering §1464 contained in §312 and, if granted, would render §312 unnecessary. Obviously, the more specific (and more limited) authority conferred by Congress should control. In addition, the general authority claimed under §303(g) would conflict with the specific prohibitions of FCC censorship contained in §326.

Furthermore, even if the FCC does have authority to issue orders other than revocations or cease and desist orders for "violation" of §1464, it can do so only when an actual violation has been proved in a criminal prosecution.

FCC v. American Broadcasting Co., 347 U.S. 284 (1954), does not require a contrary result. That case involved the construction of §1304, not §1464. Further, the Court noted that the FCC could act pursuant to §1304 only if the conduct to be regulated was "unlawful" or "illegal" under §1304. There has been no finding, in any criminal proceeding, that the seven words at issue here violate §1464.

The FCC is attempting to impose a prior restraint on speech without any of the protection afforded by a criminal prosecution and in the absence of explicit statutory authority to do so. Since the Order interferes with core First Amendment interests, and does so with no clear, apparent statutory authority, this Court could uphold the ruling below on this ground alone.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

A Selection of Significant Materials From Other Media Containing Language Banned by the FCC

Introduction

The FCC failed to consider the impact of its order on the broadcast of significant, non-obscene works. As Judge Tamm noted below, the FCC's action would "proscribe the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." (Pet. App. A. 14-15).

What follows is simply a selection - not intended to be exhaustive - of contemporary works of prose, poetry, drama, music and children's literature, works that have been widely recognized as materials of significant cultural or educational importance but that, because they contain one or more of the banned words, could not be broadcast under the FCC order.

The list in Appendix 1, which is limited to a selection of recent, contemporary literature, includes in the prose category, inter

alia, four Nobel prize winners, three Pulitzer prize winners and seven National Book Award winners; in poetry, one Nobel prize (overlapping the fiction category), four Pulitzers, five National Book Awards, and two Bollinger Prizes; in drama, seven New York Drama Critics Awards, seven "Tony" Awards, three Pulitzer prizes.

Ths list in Appendix 2, which is limited to a selection of recent literature intended for a children's or young adults' audience, includes one recent winner of a prestigious Newbery Honor Award for children's literature, several books on the American Library Association's Young Adult Services Division's 1977 list of "Best Books for Young Adults" and a number of books recommended for young readers by groups such as the New York Public Library and The National Council of Teachers of English (elementary English recommendation).

The unfortunate impact of the FCC order may not be surprising with regard to the works of general literature catalogued in Appendix 1, although even the selected list

indicates the massive and overbroad effect of the Commission's order on the broadcast of material already accepted in other media. In addition, of course, many original works created specially for broadcast would also have to be censored, regardless of their value or their intended audience or the importance of strong language to the expression of the message they wish to convey, if the FCC's order were upheld.

More interesting, perhaps, is the significant list of literature recognized and recommended for children and young adults (catalogued in Appendix 2) which falls afoul of the FCC ban. This selected list powerfully demonstrates the empirical and philosophical bankruptcy of a ruling premised upon so fundamentally erroneous a view regarding the relation between language and the psychological or educational needs of children. Literature of significant value to children could well contain the banned words without doing harm to children in any way.

It should be noted that the process of isolating such words in literature does violence to the work of art as a whole and is inimical to amici. But this is the

inevitable result of the Commission's order which would ban these works from being broadcast unless the "indecent" words were deleted, and it is for the limited purpose of demonstrating the impermissible effect of the Order tha amici have compiled the selected listings that follow.

With so many media of electronic broadcast in operation or being developed, and in light of the obvious, yet not fully tapped, potential of broadcasting to enlighten and entertain, amici find it difficult to believe that Congress has required, or that the Constitution permits, the censorship or exclusion from broadcast in the guise of FCC licensure or regulation of so much material of true value to adults and to children. As Judge Bazelon concluded in his concurring opinion below, "The impact of television and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communication in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship." (Pet. App. A. 41).

I - General Literature

(a) Prose

1. Saul Bellow
   MR. SAMMLER'S PLANET (Viking. 1970)
   Nobel Prize for Literature, 1976
   Pulitzer Prize for Literature, 1976
   National Book Award, 1971

2. Samuel Beckett
   MOLLOY (Grove, 1955)
   Nobel Prize for Literature, 1969

3. Heinrich Boll
   GROUP PORTRAIT WITH LADY (Avon, 1974)
   Nobel Prize for Literature, 1972

4. Patrick White
   RIDERS IN THE CHARIOT (Viking, 1961)
   Nobel Prize for Literature, 1973

5. Bernard Malamud
   THE FIXER (Farrar, Straus & Giroux, 1966)
   Pulitzer Prize for Literature, 1967
   National Book Award, 1967

6. Norman Mailer
   THE ARMIES OF THE NIGHT (Signet, 1968)
   Pulitzer Prize for Literature, 1969
   National Book Award, 1969

7. Thomas Pynchon
   GRAVITY'S RAINBOW (Viking, 1973)
   National Book Award, 1974

8. John Barth
   CHIMERA (Random House, 1972)
   National Book Award, 1973

9. John Cheever
FALCONER (Knopf, 1977)
National Book Critics Circle Award nominee, 1977

10. Toni Morrison
SONG OF SOLOMON (Knopf, 1977)
National Book Critics Circle Award, 1977

11. William Gaddis
JR (Knopf, 1975)
National Book Award, 1976

12. Walker Percy
THE LAST GENTLEMAN (Farrar, Straus & Giroux, 1966)
National Book Award nominee, 1967

13. William Styron
CONFESSIONS OF NAT TURNER (Random House, 1967)
National Book Award nominee, 1968

14. Renata Adler
SPEEDBOAT (Random House, 1976)
National Book Critics Circle Award nominee, 1976
P.E.N. Ernest Hemingway Award for Best First Book of Fiction, 1976

15. Wallace Stegner
THE SPECTATOR BIRD (Doubleday, 1976)
National Book Award, 1977

16. John Updike
RABBIT REDUX (Knopf, 1971)
National Book Award nominee, 1972

(b) Poetry

1. Robert Penn Warren
SELECTED POEMS, 1923-1975
(Random House, 1976)
Pulitzer Prize, 1957
Bollinger Prize for Poetry, 1967
National Medal for Literature, 1970

2. James Merrill
BRAVING THE ELEMENTS (Atheneum, 1973)
Pulitzer Prize, 1977
Bollingen Prize for Poetry, 1972
National Book Award, 1967
National Book Award nominee, 1973

3. Gary Snyder
TURTLE ISLAND (New Directions, 1974)
Pulitzer Prize, 1977

4. John Ashbery
SELF-PORTRAIT IN A CONVEX MIRROR
(Viking, 1975)
Pulitzer Prize, 1976
National Book Award, 1976

5. John Berryman
DREAM SONGS (Farrar, Straus & Giroux, 1969)
National Book Award, 1969

6. Allen Ginsberg
THE FALL OF AMERICA (City Lights, 1972)
National Book Award, 1974

7. Frank O'Hara
THE COLLECTED POEMS OF FRANK O'HARA
(Knopf, 1972)
National Book Award, 1972

8. Samuel Beckett
COLLECTED POEMS IN ENGLISH & FRENCH
(Grove, 1977)
Nobel Prize for Literature, 1969

(c) Drama

1. Joseph A. Walker
THE RIVER NIGER (Hill and Wang, 1973)
Best Play, Tony Award (1973
Best Play on Off Broadway (OBIE), 1973

2. Miguel Pinero
SHORT EYES (Hill and Want, 1974)
Best Play on Off Broadway
Best Play, New York Drama Critics'
Circle

3. Jason Miller
THAT CHAMPIONSHIP SEASON (Atheneum,
1972)
Best Play, Tony Award
Pulitzer Prize
Best Play, New York Drama Critic's
Circle, 1972

4. Lanford Wilson
THE HOT L BALTIMORE (Dodd, Mead, and
Co., 1973)
Best Play on Off Broadway (OBIE)
New York Drama Critic's Circle Award

5. David Storey
THE CHANGING ROOM (Random House, 1972)
Best Play, New York Drama Critic's
Circle Award

6. Simon Gray
BUTLEY (Viking Press, 1971)
Tony Awards

7. David Rabe
STICKS AND BONES (Dodd, Mead & Co.,
1972)
Tony Award

8. Brendan Behan
BORSTAL BOY (Knopf, 1959)
Best Play, Tony Award
Best Play, New York Drama
Critic'sircle Award

9. Charles Gordone
NO PLACE TO BE SOMEBODY
(Dodd, Mead & Co., 1969)
Pulitzer Prize

10. Howard Sackler
THE GREAT WHITE HOPE (Dial Press, 1968)
Best Play, Tony Awards
Best Play, New York Critics'
Circle Award
Pulitzer Prize

II - Childrens and Young Adults Literature

1. Don Bredes
HARD FEELINGS (Atheneum, 1977)
ALA Best Books for Young Adults, 1977
Wallace Stengner Fellowship Winner

2. Robin F. Brancato
WINNING (Knopf, 1977)
ALA Best Books for Young Adults, 1977

3. Robert Cormier
I AM THE CHEESE (Pantheon, 1974)
ALA Best Books for Young Adults, 1977

4. Kurt Vonnegut, Jr.
SLAUGHTERHOUSE FIVE (Dell, 1968)
National Book Award nominee, 1970
New York Public Library Outstanding Fiction List for Young Adults, 1976

5. Kin Platt
HEADMAN (Dell, 1977)
ALA Best Book for Young Adults
Elementary English recommendation (Nat'l Council of Teachers of English)

6. Rosa Guy
RUBY (Viking, 1976)
ALA Best Book for Young Adults

7. Richard Peck
THE GHOST BELONGED TO ME (Viking, 1975)
ALA Best Book ror Young Adults, 1977

8. Ken Kesey
ONE FLEW OVER THE CUCKOO'S NEST (Viking, 1962)
New York Library Outstanding Fiction for Young Adults, 1976

9. Alice Childress
A HERO AIN'T NOTHIN BUT A SANDWICH (Coward, McCann, 1973)
National Book Award (childrens books) nominee, 1974

10. Joanna Reis
THE UPSTAIRS ROOM (Crowell, 1972)
Newbery Honor Award
Charles & Bertie G. Schwartz Award, 1972 (Nat'l Jewish Book Council)

11. John Donovan
WILD IN THE WORLD
National Book Award (childrens books) nominee, 1972